# EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED. . 84-6811-CFH Title: warren McCleskey, Petitioner atus: GRANTED V. PITAL CASE Raiph Kemp, Superintendent, Georgia Diagnostic and Classification Center Court: United States Court of Appeals for the Eleventh Circuit cketed: y 28, 1985 Counsel for petitioner: Boger, John Charles Counsel for respondent: Westmoreland, Mary Beth try Date Note Proceedings and Orders May 28 1985 G Petition for writ of certiorari and motion for leave to proceed in forma pauperis tiled. notion of International Human Rights Law Group for leave Jun 27 1985 G to file a brief as amicus curiae filed. Jun 28 1985 G notion of Congressional Black Caucus for leave to file a uriet as aricus curiae filed. Jun 28 1985 G motion of Peter Sperlich, et al. for leave to file a oriet as amici curiae filed. Brief of respondent Ralph M. Kemp, Superintendent in Jul 1 1985 opposition filed. Jul 3 1985 DISTRIBUTED. September 30, 1985 Oct 7 1985 motion of International Human Rights Law Group for leave to tile a priet as amicus curiae GRANTED. Oct 7 1985 motion of Congressional Black Caucus for leave to file a uriet as amicus curiae GRANTED. Jun 23 1986 KEDISTKIBUTED. June 26, 1986 Jun 27 1986 KEDISTRIBUTED. July 2, 1986 Jul 7 1986 retition GRANTED. Limited to Questions 1, 2, 3, 4 and 5 presented by the petition. \* Jul 7 1986 The motion of petitioner for leave to proceed in forma pauperis is GRANTED. The petition for a writ of certiorari is GRANTED Limited to Questions 1, 2, 3, 4 and b presented by the petition. \*\*\*\*\*\*\*\*\* SET FOR ARGUMENT. Wednesday, October 15, 1986. (1st Jul 28 1986 case). (1 hour). Aug 21 1986 G notion of Congressional Black Caucus, et al. for leave to file a brief as amici curiae filed. Aug 21 1986 G notion of International Human Rights Law Group for Leave to file a priet as amicus curiae filed. Aug 21 1986 6 motion of Franklin M. Fisher, et al. for leave to tile a priet as amici curiae filed. Aug 26 1986 Joint appendix filed. Aug 27 1986 LIRCULATED. Sep 3 1986 X Brier of petitioner Warren McCleskey filed. Sep 19 1986 X Briet amicus curiae of Washington Legal Foundation filed. Sep 22 1986 X Erier of respondent files. Sep 22 1985 X Brier amicus curiae of California, et al. filed.

notion of Congressional Black Caucus, et al. for leave

THE HOUSE

Oct 6 1986

ntry		Dat	e	Note	Proceedings and Orders
36	Oct		1986		to file a trief as amici curiae GRANTED. Justice Scalia
40	Oct	6	1986		notion of International Human Rights Law Group for leave to file a brief as amicus curiae GRANTED. Justice Scalia UUT. hotion of Franklin M. Fisher, et al. for leave to file a
42	Oct	15	1986	X Rep	brief as amici curiae GRANTED. Justice Scalia OUT.  Ly brief of petitioner Warren McCleskey filed.  ARGUED.

# EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

# 84-6811

No. 84-\_\_\_

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

WARREN McCLESKEY,

Petitioner,

-against-

RALPH M. KEMP, Superintendent, Georgia Diagnostic & Classification Center,

Respondent,

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JULIUS L. CHAMBERS
JAMES M. NABRIT, III

JOHN CEARLES BOGER
DEVAL L. PATRICK
99 Hudson Street
New York, New York 10013
(212) 219-1900

ROBERT H. STROUP 1515 Healey Building Atlanta, Georgia 30303

TIMOTHY K. PORD 600 Pioneer Building Seattle, Washington 98104

ANTHONY G. AMSTERDAM
New York University
School of Law
40 Washington Square South
New York, New York 10012

\* COUNSEL OF RECORD

ATTORNEYS FOR PETITIONER

MAY 28 1985

OFFICE OF THE CLERK
SUPPREME COURT, U.S.

22398

#### QUESTIONS PRESENTED

- 1. Is proof of specific intent or motive to discriminate a necessary element of an Eighth Amendment claim that a State has applied its capital statutes in an arbitrary, capricious, and discriminatory pattern?
- 2. To make out a <u>prima facie</u> case under the Fourteenth Amendment, must a capital inmate alleging discrimination in a State's application of its capital statutes present statistical evidence "so strong as to permit no inference other than that the results are a product of racially discriminatory intent or purpose?"
  - 3. Does a proven disparity in the imposition of capital sentences, reflecting a systematic bias of death-sentencing outcomes against black defendants and those whose victims are white, offend the Eighth and Pourteenth Amendments irrespective of its magnitude?
  - 4. Does a 20-point racial disparity in death-sentencing rates among that class of cases in which a death sentence is a serious possibility so undermine the evenhandedness of a capital sentencing system as to violate the Eighth or Fourteenth Amendment rights of a death-sentenced black defendant in that class of cases?
  - 5. Must a capital defendant proffer evidence sufficient to prove that he was personally discriminated against because of his race in order to obtain an evidentiary hearing on allegations that he has been subjected to a State death-sentencing statute administered in an arbitrary or racially discriminatory manner?

- 6. Does the prosecution's failure to correct or reveal the false testimony of a key State's witness regarding an "informal" promise of favorable treatment made to the witness by a police detective violate the due process principles of Giglia v. United States? If so, can such a violation be harmless error when no other evidence informed the jury of the witness' motivation to testify favorably for the State?
- 7. Was the trial court's instruction to the jury on the element of intent -- an instruction virtually identical to the one condemned in <a href="#Francis v. Franklin">Francis v. Franklin</a>, U.S. \_\_\_\_, 53 U.S.L.W. 4495 (U.S. April 30, 1985) -- harmless error beyond a reasonable doubt?
- 8. Did the State's exclusion for cause of two prospective jurors who could fairly have determined petitioner's guilt or innocence, solely because their attitudes toward capital punishment would have prevented them from serving fairly at the penalty phase, violate petitioner's Sixth, Eighth or Fourteenth Amendment rights to an impartial jury and to a jury selected from a representative cross-section of the community?

## TABLE OF CONTENTS

			Page
QUES	TIONS	PRESENTED	i
CITA	TIONS	TO OPINIONS BELOW	1
JURI	SDICT	TION	1
CONS	TITUT	TIONAL AND STATUTORY PROVISIONS INVOLVED	2
STAT	EMENT	OF THE CASE	2
	A.	Racial Discrimination And Arbitrari-	
		ness	2
		1. The Historical Setting	2
		<ol><li>Race And The Death Penalty</li></ol>	11
		3. Petitioner's Record Evidence:	
		The Baldus Studies	15
		4. The Opinion of the Court of	
		Appeals	27
	В.	Petitioner's Giglio Claim	34
	c.	Petitioner's Claim Under Sandstrom v. Montana and Francis v. Franklin	36
	D.	Petitioner's Death-Qualification	
		Claim	37
HOW	THE F	EDERAL QUESTIONS WERE RAISED AND	
D	ECIDE	D BELOW	37
REAS	ONS F	OR GRANTING THE WRIT	40
I.		Court Should Grant Certiorari To	
	Cons	ider Whether A Condemned Inmate	
	Diff.	Can Demonstrate Systematic Racial erences In Capital Sentencing Out-	
	come	s Must Also Prove Specific Intent	
		urpose To Discriminate In Order To	
	Esta	blish An Eighth Amendment Violation	43
II.		Court Should Grant Certiorari To	
	Cons	ider Whether The Extraordinary dard of Proof Imposed By The Court	
	of A	ppeals In Cases Involving Statis-	
		l Evidence of Discrimination In	
	Capi	tal Sentencing Conflicts With Prior	
	Deci	sions Of This Court Or Those Of	
	Other	r Circuits	46
III.	The	Court Should Grant Certiorari To	
	Revi	ew The Court Of Appeals' Holding	
		The State's Nondisclosure Of An rmal Promise Of Favored Treatment	
		Not Implicate The Due Process	
	Requ	irement Of Giglio v. United States	50

IV.	Consider tions Reg Sandstrom	Impo ard:	ould Grant Certiorari To ortant, Unresolved Ques- ing Harmless Error Under Montana And Francis v.
v.	The Issue	s Co	ould Grant Certiorari On ommon To This Case, Grigsby Keeten v. Garrison
CONC	LUSION		
APPE	NDICES		
	Appendix	A -	Opinion of the United States Court of Appeals for the Ele- venth Circuit in McCleskey v. Kemp, 753 F.2d 877 (11th Cir. 1985) (en banc), entered January 29, 1985
	Appendix	В -	Opinion of the United States District Court for the Northern District of Georgia, Atlanta Division, in McCleskey v. Zant, 580 F. Supp. 338 (N.D. Ga. 1984), entered February 1, 1984
	Appendix	c -	Order denying rehearing, entered March 26, 1985
	Appendix	D -	Statutory Provisions Involved
	Appendix	E -	Statement of Facts From Petitioner's Post-Hearing Memorandum of Law in Support of His Claims of Arbitrariness and Racial Discrimination, submitted to the District Court in McCleskey v. Zant, 580 F. Supp. 338 (N.D. Ga. 1984); and Statement of Facts from En Banc Brief for Petitioner McCleskey, submitted to the Court of Appeals in McCleskey v. Kemp, 753 F.2d 877 (11th Cir. 1985) (en banc)

Page

## TABLE OF AUTHORITIES

Cases	Page
Annunziato v. Manson, 566 F.2d 410 (2d Cir. 1977)	53
Arlington Heights v. Metropolitan Housing	
Development Corp., 429 U.S. 252 (1977)	
Avery v. Georgia, 345 U.S. 559 (1953)	
Beck v. Alabama, 447 U.S. 625 (1980)	44
La. 1980), aff'd, 654 F.2d 719 (5th Cir. Unit A 1980)	51
Boone v. Paderick, 541 F.2d 447 (4th Cir. 1976)	51
Campbell v. Reed, 594 F.2d 4 (4th Cir. 1979)	51
Castaneda v. Partida, 430 U.S. 482 (1977)	47
Coble v. Hot Springs School District No. 6, 682 F.2d 721 (8th Cir. 1982)	47
Connecticut v. Johnson, 460 U.S. 73 (1983)	55,56
Downer v. Dunaway, 1 F. Supp. 1001 (M.D. Ga. 1932)	10
DuBose v. Lefebre, 619 F.2d 973 (2d Cir. 1980)	51
Eastland v. TVA, 704 F.2d 613 (11th Cir. 1983)	48
Eddings v. Oklahoma, 455 U.S. 104 (1982)	44
EEOC v. Ball Corp., 661 F.2d 531 (6th Cir. 1981)	47
EEOC v. Federal Reserve Bank of Richmond,	
698 F.2d 633 (4th Cir. 1983)	47
Franklin v. Francis, 720 F.2d 1206 (11th Cir. 1983)	39
Prancis v. Pranklin; U.S. , 53 U.S.L.W. 4495 (U.S. April 30, 1985)39	,54,55,56
Purman v. Georgia, 408 U.S. 238 (1972)	12,13,38
Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978)	49
Giglio v. United States, 405 U.S. 150 (1972)	39.50.52
Godfrey v. Georgia, 446 U.S. 420 (1980)	
Gregg v. Georgia, 428 U.S. 153 (1976)	12,13,38
	41,44,45

Cases	Page
Grigsby v. Mabry, 758 F.2d 226 (8th Cir.	
1985) (en banc)	57
Grigsby v. Mabry, 569 F. Supp. 1273 (E.D.	
Ark. 1983)	40,57
Haber v. Wainwright, 756 F.2d 1520 (11th	
Cir. 1985)	53
Hazelwood School District v. United States,	
433 U.S. 299 (1977)	47
Hunter v. Underwood, U.S. , 53 U.S.L.W. 4468 (U.S. April 16, 1985)	
	46,47
International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977)	49
40	
Jones v. Georgia, 389 U.S. 25 (1967)	11
Keeten v. Garrison, 742 F.2d 129 (4th Cir.	
1984)	57
Regten v. Garrison, 578 F. Supp. 1164	
(W.D.N.C. 1984)	40,57
Koehler v. Engle, U.S, 80 L.Ed.	
2d 1 (1984)	55
Lockett v. Ohio, 438 U.S. 586 (1978)	44
Mayor of Philadelphia v. Educational	
Equality League, 415 U.S. 605 (1973)	47
McCleskey v. Kemp, 753 F.2d 877 (11th Cir.	
1985) (en banc)	passim
McCleskey v. Zant, 580 F. Supp. 338	
(N.D. Ga. 1984)	passim
Napue v. Illinois, 360 U.S. 264 (1959)	50,52
Plessy v. Ferguson, 163 U.S. 537 (1896)	9,43
Pyle v. Kansas, 317 U.S. 213 (1942)	52
Reece v. Georgia, 350 U.S. 85 (1955)	11
Rose v. Mitchell, 443 U.S. 545 (1979)	11
Sandstrom v. Montana, 442 U.S. 510 (1979)	54
Scott v. Sandford, 60 U.S. (19 How.) 393 (1857)	2,3,43
393 (1037)	2,3,43
Screws v. United States, 325 U.S. 91 (1945)	10
	10
Segar v. Smith, 738 F.2d 1249 (D.C. Cir. 1984)	48,49
Sims v. Georgia, 389 U.S. 404 (1967)	11

Cases	Page
Slaughter House Cases, 83 U.S. (16 Wall.)	
36 (1873)	5,7
Smith v. Balkcom, 671 F.2d 858 (5th Cir. Unit B 1982)	40
Smith v. Balkcom, 660 F.2d 573 (5th Cir. Unit B 1981)	32
Strauder v. West Virginia, 100 U.S. 303	8
Sullivan v. Wainwright, U.S. , 78 L.Ed.2d 210 (1983)	31
Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981)	48
Tucker v. Francis, 723 F.2d 1504 (11th Cir.	
1984)	39
Turner v. Fouche, 396 U.S. 346 (1970)	11
United States v. Bigeleisen, 625 F.2d 203 (8th Cir. 1980)	51
United States v. Butler, 567 F.2d 885 (9th Cir. 1978)	51
University of California Regents v. Bakke, 438 U.S. 265 (1978)	9
Vuyanich v. Republic Nat'l Bank, 505 F. Supp. 224 (N.D. Tex. 1980), vacated on other grounds, 723 F.2d 1195 (5th Cir. 1984)	48,49
	40,45
Wainwright v. Adams, U.S, 80 L.Ed.2d 809 (1984)	31
Wainwright v. Ford,, 82 L.Ed.2d 911 (1984)	31
Washington v. Davis, 426 U.S. 229 (1976)	
Whitus v. Georgia, 385 U.S. 545 (1967)	11
Wilkins v. University of Houston, 654 F.2d 388 (5th Cir. 1981), vacated	
u.s. 809 (1982)	47
Williams v. Georgia, 349 U.S. 375 (1955)	11
Williams v. Griswald, 743 F.2d 1533 (11th	.,
Cir. 1984)	52
Witherspoon v. Illinois, 391 U.S. 510 (1968)	57
Wolfe v. Georgia Ry. & Elec. Co., 2 Ga.	

Cases	Page
Woodson v. North Carolina, 428 U.S. 280 (1976)	44
Yick Wo v. Hopkins, 118 U.S. 356 (1886)	14
Zant v. Stephens [II], 462 U.S. 862 (1983)	15
Zant v. Stephens [I], 456 U.s. 410 (1982) (per curiam)	14
Statutes	
18 U.S.C. § 751	53
28 U.S.C. § 1254(1)	2
Ga. Code Ann. § 27-2534.1(b)(2)	25
Former Ga. Code § 77-9904 (1950)	9
The Code of the State of Georgia (R. Clark, T. Cobb & D. Irwin,	
compilers 1861)	4
Emancipation Proclamation, 12 Stat. 1267, Jan. 1, 1863	5
Other Authorities	
D. Baldus & J. Cole, Statistical Proof	
of Discrimination (1980)	16
Bickel, The Original Understanding and the Segregation Decision, 69 Harv. L.	
Rev. 1 (1956)	7
W. Bowers, Legal Homicide: Death as Punishment in America 1864-1982 (1984)	12
Bowers & Pierce, Arbitrariness and Dis-	
crimination under Post-Furman Capital	
Statutes, 26 Crime & Deling. 563 (1980)	12
Colonial Records of Georgia (A. Candler, ed. 1904)	4
D. Fehrenbacher, The Dred Scott Case: Its Significance in American Law & Politics	4
(1978)	•
Fleming, Documentary History of Recontruction (1906)	7
J. Franklin, The Emancipation Proclamation (1963)	5
Garfinkel, Research Note on Inter- and	
Intra-Racial Homicides, 27 Social	12

Other Authorities	Page
L. Higginbotham, Jr., In The Matter of Color: Race & The American Legal Process	
(1978)	4
J. Hurd, The Law of Freedom and Bondage in the United States (Vol. I. 1858;	
Vol. II, 1862)	3
F. Johnson, The Development of State Legislation Concerning the Free Negro	
(1958)	7
Johnson, The Negro and Crime, 217 Annals 93 (1941)	12
L. Litwack, Been In the Storm So Long: The Aftermath of Slavery (1979)	6
J. McPerson, History of the Reconstruction (1971)	7
G. Myrdal, An American Dilemma: The	,
Negro Problem & Modern Democracy (1944)	10
N.Y. Times, July 27, 1946	10
Radelet, Racial Characteristics and the Imposition of the Death Penalty, 46	
Am. Soc. Rev. 918 (1981)	12
F. Raper, The Tragedy of Lynching (1933)	10
Report of the Joint Committee on Recon- struction, 39 Cong., 1st Sess., Part	
III (1867)	6
B. Schwartz, Statutory History of the United States - Civil Rights (1960)	5
K. Stampp, The Peculiar Institution: Slavery in the Ante-Bellum South	
(1956)	3,5
States' Laws on Race and Color (P. Murray ed. 1950)	9
	7
J. tenBroek, Equal Under Law (1965)	,
United States Dept. of Justice, Bureau of Prisons, National Prisoner Statistics,	
No. 46, Capital Punishment 1930-1970 (Aug. 1971)	11
T. Wilson, The Black Codes of the South	7
(1965)	,
Wolfgang & Riedel, Race, Judicial Discre- tion and the Death Penalty, 407 Annals 119 (May 1973)	12
Wolfgang & Riedel, Rape, Race, and the	
Death Penalty in Georgia, 45 Am. J. Orthopsychiat. 658 (1975)	12
Zeisel, Race Bias in the Administration of the Death Penalty: The Florida Experience,	
95 Hary 1. Dev 456 (1981)	12

No. 84-

IN THE

SUPREME COURT OF THE UNITED STATES
October Term, 1984

WARREN MCCLESKEY,

etitioner,

-against-

RALPH M. KEMP, Superintendent, Georgia Diagnostic & Classification Center,

Respondent,

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Petitioner Warren McCleskey respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

#### CITATIONS TO OPINIONS BELOW

The majority, concurring, and dissenting opinions in the United States Court of Appeals for the Eleventh Circuit en banc, which are officially seported at 753 F.2d 877 (11th Cir. 1985), are annexed as Appendix A.

The opinion of the United States District Court for the Northern District of Georgia, Atlanta Division, which is officially reported at 580 F. Supp. 338 (N.D. Ga. 1984), is annexed as Appendix B.

#### JURISDICTION

The judgment of the Court of Appeals was entered on January 29, 1985. A timely motion for rehearing was denied on March 26,

1985. A copy of the order denying rehearing is annexed as Appendix C. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

#### CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth Amendment to the Constitution of the United States, which provides in relevant part:

In all criminal prosecutions, the accused shall enjoy the right to a ... trial, by an impartial jury;

the Eighth Amendment to the Constitution of the United States, which provides in relevant part:

[N]or [shall] cruel and unusual punishments [be] inflicted:

and the Fourteenth Amendment to the Constitution of the United States, which provides in relevant part:

[N]or shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The case also involves the following statutory provisions, the texts of which are set forth in Appendix D: Former Ga. Code Ann. §§ 26-603; 26-604; 26-1101; 59-806(4); 59-807.

#### STATEMENT OF THE CASE

#### A. Racial Discrimination and Arbitrariness

### The Historical Setting

For the first two hundred and fifty years of our colonial and national experience, black persons, as Chief Justice Taney confessed in the <u>Dred Scott</u> case, were "regarded as being of an inferior order; and altogether unfit to associate with the white

0

race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to accept ... This opinion was at that time fixed and universal in the civilized portion of the white race. It was regarded as an axiom in morals as well as in politics, which no one thought of disputing, or supposed to be open to dispute; and men in every grade and position in society daily and habitually acted upon it in their private pursuits, as well as in matters of public concern, without doubting for a moment the correctness of this opinion. Scott v. Sandford, 60 U.S. (19 How.) 393, 407 (1857).

This radical judgment about the relative worth of black and white lives found its way deep into the fabric, not only of the national mind, but of the criminal law. Well before the Civil War, mos t of the Southern States had promulgated separate "slave codes" that harshly regulated the criminal and civil conduct of black persons. Although the colony of Georgia, for example, initially banned the importation of blacks and forbade their use

See generally J. Hurd, The Law of Freedom and Bondage in the United States (Vol. I, 1858; Vol. II, 1862). See also K. Stampp, The Peculiar Institution: Slavery in the Ante-Bellum South 206-31 (1956). Id. at 210:

State criminal codes dealt more severely with slaves and free Negroes than with whites. In the first place, they made certain acts felonies when committed by Negroes but not when committed by whites; and in the second place, they assigned heavier penalties to Negroes than whites convicted of the same offense. Every southern state defined a substantial number of felonies carrying capital punishment for slaves and lesser punishments for whites. In addition to murder of any degree, slaves received the death penalty for attempted murder, manslaughter, rape and attempted rape upon a white woman, rebellion and attempted rebellion, poisoning, robbery, and arson. A battery upon a white person might also carry a sentence of death under certain circumstances.

Id. at 210.

as slaves, 2 it had by 1750 accepted slavery as an institution; and by the time of the Civil War it had adopted penal laws that prescribed different sanctions for criminal offenders depending upon their race and the race of their victim:

For instance, conviction of raping a white woman, which meant a prison sentence of two to twenty years for a white offender, carried a mandatory death penalty for Negro offenders. Even attempted rape of a white woman by a black man could be punished with death, at the discretion of the court. On the other hand, rape of a slave or a free Negro by a white man was punishable 'by fine and imprisonment, at the discretion of the court.'

Under colonial law, the killing of a slave in the course of chastisement or in a fit of passion was a minor offense at most and seldom punished. Even for willful, malicious homicide the prescribed penalty was ordinarily no more than a fine. Beginning with a North Carolina Law of 1774, all of the slaveholding states eventually imposed death as the punishment for deliberate murder of a slave. ... Non-fatal abuse of slaves was occasionally punished under the common law of the general criminal code, and by the 1850s most states provided statutory protection of some kind. The Georgia Code of 1861, for instance, defined excessive whipping and various other cruelties as misdemeanors, punishable by fine or imprisonment at the discretion of the court....

Fehrenacher, supra, note 4 at 34-35.

<sup>1</sup> Colonial Records of Georgia (A. Candler, ed.) 49-52 (1904), cited in A.L. Higginbotham, Jr., In The Matter Of Color: Race & The American Legal Process: The Colonial Period 216-27, 439 n.2 (1978).

<sup>3 1</sup> Colonial Records of Georgia 56-62 (A. Chandler, ed. 1904).

D. Fehrenbacher, The Dred Scott Case: Its Significance in American Law & Politics 31 (1978). See generally The Code of the State of Georgia (R. Clark, T. Cobb & D. Irwin, compilers 1861). Professor Fehrenbacher notes that murder of a slave by a white was, throughout this period, subject to relatively minor punishment under most state statutes:

These racial distinctions could work to the advantage of black defendants, so long as their <u>victims</u> were also black. As Professor Stampp explains "[a] slave accused of committing violence upon another slave, rather than upon a white, had a better chance for a fair trial. Here the deeper issues of discipline and racial subordination were not involved, and the court could hear the case calmly and decide it on its merits. Moreover, the penalty on conviction was usually relatively light. Slaves were capitally punished for the murder of other slaves almost as rarely as whites were capitally punished for the murder for slaves."

One obvious aim of the national government in the Civil War, articulated in the Emancipation Proclamation and subsequently embodied in the Thirteenth Amendment, was to end the legal subordination of blacks in slavery. Yet the close of the Civil War brought no immediate halt to the widespread Southern pattern of disregard for black life, or to the disparity in legal

How many black men and woman were beaten, flogged, mutilated and murdered in the first year of emancipation will never be known. ... Reporting on 'outrages' committed in Kentucky, a [Freedmen's] Bureau official confined himself to several counties and only to those cases in which he had sworn testimony, the names of the injured, the names of the alleged offenders, and the dates and localities.

K. Stampp, supra note 1, at 227.

<sup>12</sup> Stat. 1267, Jan. 1, 1863. See J. Franklin, The Emancipation Proclamation (1963).

Slaughter House Cases, 83 U.S. (16 Wall.) 36, 67-69 (1873). See 1 B. Schwartz, Statutory History of the United States -- Civil Rights 25-96 (1960).

After his exhaustive review of contemporary news accounts, diaries, and other primary Reconstruction sources, Professor Leon Litwack summarizes his findings on extra-legal violence as follows:

<sup>&#</sup>x27;I have classified these outrages as follows: Twenty-three cases of severe and inhuman beating and whipping of men; four of beating and shooting; two of robbing and shooting; three of robbing; five men shot and killed; two shot and

treatment of those black and white defendants actually brought before the courts. The persisting disparity resulted both from a practical inability to sentence whites for crimes against blacks

wounded; four beaten to death; one beaten and roasted; three women assaulted and ravished; four women beaten; two women tied up and whipped until insensible; two men and their families beaten and driven from their homes, and their property destroyed; two instances of burning of dwellings, and one of the inmates shot.'

Because of the difficulty in obtaining evidence and testimony, the officer stressed that his report included only a portion of the crimes against freedmen. 'White men, however friendly to the freedmen, dislike to make depositions in those cases for fear of personal violence. The same reason influences the black -- he is fearful, timid and trembling. He knows that since he has been a freedman he has not, up to this time, had the protection of either the federal or state authorities; that there is no way to enforce his rights or redress his wrongs."

L. Litwack, Been In The Storm So Long: The Aftermath Of Slavery 276-77 (1979) quoting 3 Report of the Joint Committee on Reconstruction, 39 Cong., 1st Sess., Part III, at 146 (1867).

Professor Litwack observes that "the infrequency with which whites were apprehended, tried and convicted of crimes against freedmen made a mockery of equal justice." L. Litwack, supra note 8, at 285. Moreover, the disparate penal sanctions imposed against those few whites who were apprehended for interracial crime were in some ways the most striking feature of the post-war criminal justice system:

The double standard of white justice was nowhere clearer, in fact, than in the disparate punishments meted out to whites and blacks convicted of similar crimes ...: [A] Preedmen's Bureau officer in Georgia despaired of any early or mass conversion to [the] ... principle ... that killing a black person amounted to murder ... 'The best men in the State admit that no jury would convict a white man for killing a freedman, or fail to hang a negro who had killed a white man in self defense.'

L. Litwack, supra note 8, 285-86.

and from the operation of statutes that explicitly made the severity of punishment dependent upon racial factors. Indeed, shortly after the war, harsh "Black Codes" were enacted by Georgia and other Southern states that retained traditional differences in punishment for crimes based upon the race of the defendant and the race of the victim.

It was in large measure this resurgence of both lawlessness and legally sanctioned discriminatory treatment of blacks throughout the South that led to the enactment of the Civil 12 Rights Act of 1866 and, ultimately, the Fourteenth Amendment. This Court has since recognized that one principal goal of the Fourteenth Amendment was to prohibit differential treatment under State penal law:

The 14th Amendment was framed and adopted ... to assure to the colored race the enjoyment of all the civil rights that under the law are enjoyed by white persons, and to give to that race the protection of the General Government, in that enjoyment whenever it should be denied by the States. It not only gave citizenship and the privileges of citizenship to persons of color, but it denied to any State power to

Slaughter House Cases, supra, 83 U.S. (16 Wall.) at 70-71. See generally T. Wilson, The Black Codes of the South (1965); F. Johnson, The Development of State Legislation Concerning the Free Negro (1958).

See generally 1 Fleming, Documentary History of Reconstruction 273-312 (1906); J. McPherson, History of the Reconstruction 29-44 (1971). See also Bickel, The Original Understanding and the Segregation Decision, 69 Harv. L. Rev. 1, 11-12, 56-58 (1956).

<sup>12</sup> See J. tenBroek, Equal Under Law 177-81, 203-04 (1965).

withhold from them the equal protection of the laws, and authorized Congress to enforce its provision by appropriate legislation. quote the language used by us in the Slaughter-House Cases, 'No one can fail to be impressed with the one pervading purpose found in all the Amendments, lying at the foundation of each, and without which none of them would have been suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over them.' So again: 'The existence of laws in the States, where the newly emancipated negroes resided, which discriminated with gross injustice and hardship against them as a class, was the evil to be remedied, and by it [the 14th Amendment] such laws were forbidden.'

If this is the spirit and meaning of the Amendment, whether it means more or not, it is to be construed liberally, to carry out the purposes of its framers. It ordains that no State shall make or enforce any laws which shall abridge the privileges or immunities of citizens of the United States (evidently referring to the newly made citizes, who, being citizens of the United States, are declared to be also citizens of the State in which they reside). It ordains that no State shall deprive any person of life, liberty or property, without due process of law, or deny to any person within its jurisdiction the equal protection of the laws. What is this but declaring that the law in the States shall be the same for the black as for the white: that all persons whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the Amendment was primarily designed, that no discrimination shall be made against them by law because of their color?

Strauder v. West Virginia, 100 U.S. 303, 306-07 (1886).

Despite these federal constitutional and legislative efforts, <u>de jure</u> discrimination in state criminal statutes, although outlawed by the Fourteenth Amendment, continued to plague the administration of justice, especially in the Southern states. The climate of public sentiment in which such official

discrimination persisted was given judicial notice by the Georgia Court of Appeals in 1907, in a case upholding a cause of action in tort for calling a white man black:

It is a matter of common knowledge that, viewed from a social standpoint, the negro race is, in mind and morals, inferior to the Caucasian. The record of each from the dawn of historic time denies equality... We take judicial notice of an intrinsic difference between the two races... Courts and juries are bound to notice the intrinsic difference between the whites and blacks in this country.

Wolfe v. Georgia Ry. & Fig. Co., 2 Ga. App. 499, \_\_\_\_, 58 S.E. 13
899, 901-02 (1907) (emphasis added).

These discriminatory views, needless to say, fostered a body of law in the State of Georgia and elsewhere intensely hostile to black people. In addition to a comprehensive code of civil law designed to segregate the races in most areas of public life, there was widespread disregard within the criminal justice system

See generally University of California Regents v. Bakke, 438 U.S. 265, 390-94 (1978) (opinion of Marshall, J.). Cf. Plessy v. Ferguson, 163 U.S. 537, 548-52 (1896) ("we think the enforced separation of the races, as applied to the internal commerce of the state, neither abridges the privileges or immunities of the colored man, deprives him of his property without due process of law, nor denies him the equal protection of the laws.... If the civil and political rights of both races be equal, one cannot be inferior to the other civilly or politically. If one race be inferior to the other socially, the Constitution of the United States cannot put them on the same plane.").

See, e.g., States' Laws on Race and Color 89-117 (P. Murray, ed. 1950) (cataloguing Georgia constitutional and statutory provisions enacted to establish a system of racial segregation.) Among these statutes, for example, is one making it a misdemeanor for any "person controlling convicts [to] ... confine white and colored convicts together, or work them chained together, or chain them together going to or from their work, or at any other time." Id. at 115, (citing Former Ga. Code § 77-9904 (1950)).

for the rights of black defendants especially, for those charged 15 with capital crimes, as well as frequent resort to extra-legal 16 violence against black criminal suspects.

In determining appropriate punishments, Gunner Myrdal reported in 1942, both the race of the defendant and that of the victim played an important part:

[The discrimination does not always run against a Negro defendant. It is part of the Southern tradition to assume that Negroes are disorderly and lack elementary morals, and to show great indulgence toward Negro violence and disorderliness 'when they are among themselves.'

For offenses which involve any actual or potential danger to whites, however, Negroes are punished more severely than whites.

. . .

Public tension and community pressure increase with the seriousness of the alleged crime.... There is thus even less possibility for a fair trial when the Negro's crime is serious. In the case of a threatened lynching, the court makes no pretence at justice; the Negro must be condemned, and usually condemned to death, before the crowd gets him.

It is well known to this Court that the influence of racial discrimination did not disappear from state criminal justice systems after World War II. On the contrary, the distorting effects of racial prejudice have continued well into the present 18 era, in the State of Georgia, as elsewhere. As Justice Blackmun

See, e.g., Downer v. Dunaway, 1 F. Supp. 1001 (M.D. Ga. 1932) (state trial of black defendant, dominated by mob violence, violated due process; habeas relief granted).

Between 1900 and 1929, the State of Georgia had the third highest rate of lynching of any state. F. Raper, The Tragedy of Lynching 483 (1933). Four black men were lynched in Monroe County, Georgia as late as 1946. N.Y. Times, July 27, 1946, § 1 at 1.

<sup>2</sup> G. Myrdal, An American Dilemma: The Negro Problem & Modern Democracy 551, 553 (1944).

See, e.g., Screws v. United States, 325 U.S. 91 (1945) (Sheriff of Baker County, Georgia, beat black defendant to death on courthouse lawn during arrest for theft of a tire); Avery v. Georgia, 345 U.S. 559 (1953) (black jurors systematically

has written, "we ... cannot deny that, 114 years after the close of the War Between the States and nearly 100 years after Strauder [v. West Virginia, supra,] racial and other forms of discrimination still remain a fact of life, in the administration of justice as in our society as a whole. Perhaps today that discrimination takes a form more subtle than before. But it is not less real or pernicious." Rose v. Mitchell, 443 U.S. 545, 558-59 (1979).

#### 2. Race and the Death Penalty

The racial discrimination so widely observed in the criminal justice system of past years has worked particular evil in the area of capital punishment. Statistics compiled nationally from 1930 through 1967 reveal that black persons, although never more than 12 percent of the population, constituted over 53 percent of all those executed during this period. For the crime of rape, blacks constituted a remarkable 405 of the 455 total executions 20 that took place. Social scientists who have examined these phenomena more closely report that the disparities are not attributable solely to a higher incidence of crime among blacks. Rather, "[s]trong statistically significant differences in the proportions of blacks sentenced to death, compared to whites,

excluded from black defendant's capital jury by use of separate white and yellow tickets for white and black prospective jurors); Williams v. Georgia, 349 U.S. 375 (1955) (same); Reece v. Georgia, 350 U.S. 85 (1955) (grand and traverse jury discrimination); Whitus v. Georgia, 385 U.S. 545 (1967) (jury discrimination by use of segregated tax records); Jones v. Georgia, 389 U.S. 25 (1967) (same); Sims v. Georgia, 389 U.S. 404 (1967) (same); Turner v. Fouche, 396 U.S. 346 (1970) (underrepresentation of blacks on Taliaferro County, Georgia grand juries).

United States Dept. of Justice, Bureau of Prisons, National Prisoner Statistics, No. 46, Capital Punishment 1930-1970, 8 (Aug. 1971).

<sup>20 &</sup>lt;u>1d</u>.

when a variety of nonracial aggravating circumstances are considered, permit the conclusion that the sentencing differentials are the product of racial discrimination."

The possibility of racial bias clearly troubled a number of Justices who voted in <u>Furman v. Georgia</u>, 408 U.S. 238 (1972) (per curiam), to strike down the capital statutes of Georgia and every other state that then imposed the death penalty. When Georgia's post-<u>Furman</u> capital statutes subsequently came before the Court for review in <u>Gregg v. Georgia</u>, 428 U.S. 153 (1976), counsel for Gregg urged that continued discrimination would be virtually

Wolfgang & Riedel, Race, Judicial Discretion and the Death Fanalty, 407 Annals 119 (May 1973). See generally W. Bowers, Legal Homicide: Death as Punishment in America 1864-1982 67-102 (1984) Ch. 3, Race Discrimination in State-Imposed Executions; Johnson, The Negro and Crime 217 Annals 93 (1941); Garfinkel, Research Note on Inter- and Intra-Racial Homicides, 27 Social Forces 369 (1949); Wolfgang & Reidel, Rape, Race, and the Death Penalty in Georgia, 45 Am. J. Orthopsychiat. 658 (1975); Bowers & Pierce, Arbitrariness and Discrimination under Post-Furman Capital Statutes, 26 Crime & Deling. 563 (1980); Radelet, Racial Characteristics and the Imposition of the Death Penalty, 46 Am. Soc. Rev. 918 (1981); Zeisel, Race Bias in the Administration of the Death Penalty: The Florida Experience, 95 Harv. L. Rev. 456 (1981).

<sup>22</sup> E.g. Furman v. Georgia, supra, 408 U.S. at 249 (Douglas, J., concurring) ("[t]he President's Commission on Law Enforcement and Administration of Justice recently concluded: 'Finally there is evidence that the imposition of the death sentence and the exercise of dispensing power by the courts and the executive follow discriminatory patterns. The death sentence is disproportionately imposed and carried out on the poor, the Negro, and the members of unpopular groups'); id. at 309-10 (Stewart, J., concurring) ("the petitioners are among a capriciously selected random handful upon whom the sentence of death has been imposed. My concurring Brothers have demonstrated that, if any basis can be discerned for the selection of these few sentenced to die, it is the constitutionally impermissible basis of race"); id. at 364 (Marshall, J., concurring) ("capital punishment is imposed discriminatorily against certain identifiable classes of people ... studies indicate that while the higher rate of execution among Negroes is partially due to a higher rate of crime, there is evidence of racial discrimination"). Cf. id. at 389 n.12 (Burger, C. J., dissenting) ("[s]tatistics are also cited to show that the death penalty has been imposed in a racially discriminatory manner. Such statistics suggest, at least as a historical matter, that Negroes have been sentenced to death with greater frequency than whites in several States"); id. at 449-50 (Powell, J., dissenting) ("[i]f a Negro defendant ... could demonstrate that members of his race were being singled out for more severe punishment than others charged with the same offense, a constitutional violation might be established.")

inevitable, since "the capital sentencing procedures adopted by Georgia in response to Furman [did] not eliminate the dangers of arbitrariness and caprice in jury sentencing that were held in Furman to be violative of the Eighth and Fourteenth Amendments." Gregg v. Georgia, supra, 428 U.S. at 200. The Court did not disagree with counsel's premise that, under Furman, the Eighth Amendment requires eradication of the influence of racial prejudice in capital sentencing. To the contrary, the Court reiterated Furman's central holding that "[b]ecause of [its] uniqueness ... the death penalty ... [may] not be imposed under sentencing procedures that create[] a substantial risk that it [will] ... be inflicted in an arbitrary and capricious manner." Gregg v. Georgia, supra, 428 U.S. at 188.

However, after reviewing the new sentencing procedures prescribed by the Georgia statute, id. at 196-98, the Court held that "[o]n their face these procedures seem to satisfy the concerns of Furman." Id. at 198. This conclusion rested on an assessment that Georgia's bifurcation of the guilt and sentencing proceedings, its provision of sentencing guidelines, and its requirement of appellate sentence review furnished prima facie "assurance that the concerns that prompted our decision in Furman are not present to any significant degree in the Georgia procedure applied here." Id. at 207. Justice White, writing for himself, the Chief Justice, and Justice Rehnquist, agreed, finding Gregg's argument "considerably overstated," id. at 221. He reasoned that "[t]he Georgia Legislature has plainly made an effort to guide the jury in the exercise of its discretion, while at the same time permitting the jury to dispense mercy on the basis of factors too intangible to write into a statute ... I cannot accept the naked assertion that the effort is bound to fail. Id. at 222. Justice White thus declined to speculate --

in the absence of clear proof to the contrary -- that Georgia's experiment with "guided discretion" statutes would inevitably fail to curb racial discrimination or arbitrariness:

Indeed, if the Georgia Supreme Court properly performs the task assigned to it under the Georgia statutes, death sentences imposed for discriminatory reasons or wantonly or freakishly for any category of crime will be set aside.

. . .

Petitioner's argument that prosecutors behave in a standardless fashion in deciding which cases to try as capital felonies is unsupported by any facts ... Absent facts to the contrary, it cannot be assumed that prosecutors will be motivated in their charging decision by factors other than the strength of their case and the likelihood that a jury would impose the death penalty if it convicts.

Id. 224-25.

In the post-Gregg era, however, the Court has emphasized that its approval of the facial validity of Georgia's capital sentencing procedures constitutes something less than a licensing of any and every result which they produce. Georgia has "a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty," Godfrey v. Georgia, 446 U.S. 420, 428 (1980) (emphasis added); and the very ratio decidendi of Gregg "recognized that the constitutionality of Georgia death sentences ultimately would depend on the Georgia Supreme Court construing the statute and reviewing capital sentences consistently with ... [the] concern [of Furman]." Zant v. Stephens [I], 456 U.S. 410, 413 (1982) (per curiam). If "Georgia attached the 'aggravating' label to factors that are constitutionally impermissible or totally irrelevant to the sentencing process, such as ... the

race ... of the defendant, ... due process of law would require that the jury's decision to impose death be set aside." Zant v. Stephens [II], 462 U.S. 862, 885 (1983).

Thus, the ultimate Eighth Amendment test, the Court has plainly said, remains whether Georgia's capital sentencing system actually works, whether its procedures truly serve to eliminate the invidious racial distinctions that have haunted its past use of the death penalty.

#### 3. Petitioner's Record Evidence: The Baldus Studies

Petitioner Warren McCleskey -- a young black man sentenced to death for the murder of a white Atlanta police officer -- has alleged that the Georgia system under which he was sentenced is racially discriminatory in its application, and is arbitrary and capricious, violating in practice both the Eighth Amendment and Equal Protection Clause of the Pourteenth Amendment. To support those claims, petitioner presented a comprehensive body of evidence to the District Court during a two-week evidentiary hearing held August 8-22, 1983.

Petitioner's submissions included: (i) two multifaceted social scientific studies of the actual application of Georgia's capital sentencing system from 1973-1979, each comprising information on hundreds of relevant items about each case (including statutory and non-statutory aggravating circumstances, mitigating circumstances, strength-of-the-evidence factors, and factors concerning the victim and the defendant); (ii) a statistical study of capital sentencing in Fulton County, where petitioner was tried and sentenced; (iii) two nonstatistical "cohort" studies, one investigating all police homicides in Fulton County since 1973, the other examining those "near neighbor" homicides in Fulton County similar to Warren

McCleskey's; and (iv) the deposition testimony of the Fulton County District Attorney concerning the sentencing policies and procedures of his office in homicide cases.

Petitioner's expert witnesses included Professor David Baldus, one of the nation's leading authorities on the legal use 24 of statistics to evaluate claims of racial discrimination; Dr. George Woodworth, a prominent theoretical and applied statisti-25 cian; and -- to evaluate the work of Baldus and Woodworth -- Dr. Richard Berk, a highly qualified social scientist, frequently consulted on criminal justice issues by the United States Department of Justice, who served as a member of a distinguished National Academy of Sciences panel charged with establishing 26 professional standards for the conduct of sentencing research.

Professors Baldus and Dr. Woodworth testified concerning their comprehensive studies of the operation of Georgia's capital sentencing system for the period 1973-1979. Baldus explained that the studies were designed from the outset to evaluate possible racial discrimination in Georgia's post-Furman capital system: "[T]he decision of the Court in Gregg proceeded on the

Petitioner also sought discovery from the State to develop anecdotal and historical evidence of racial discrimination in the criminal justice system of Fulton County and the State of Georgia, and, more broadly, in all city, county and state government activities. See Petitioner's Motion for Discovery, dated April 7, 1983. The District Court denied petitioner's request for this discovery, holding that this information was "not relevant to any issue presented by the petitioner." Order of June 3, 1983, at 2. Consequently, petitioner was unable to present such evidence during his evidentiary hearing.

Professor Baldus is co-author of D. Baldus & J. Cole, Statistical Proof of Discrimination (1980), a work widely relied upon by federal and state courts. See cases cited in DB 6. (Each of petitioner's exhibits bears the initials of the witness through whom it was offered, e.g., David Baldus exhibits are marked "DB," followed by the appropriate exhibit number).

<sup>25</sup> GW 1.

RB 1; see Tr. 1761-62. (All references to the transcript of the evidentiary hearing held in the District Court on August 8-22, 1983, will be indicated by the abbreviation "Tr." followed by the number of the page on which the reference may be found.)

assumption that the procedural safequards adopted in ... Georgia ... were adequate to insure that death sentencing decisions would be neither excessive nor discriminatory.... [M]y principal concern was [to investigate] whether or not those assumptions ... were valid." (Tr. 129).

Baldus' studies followed state-of-the-art procedures in questionnaire design, data collection, and data analysis. Since the Court of Appeals assumed the validity of Baldus' studies --denying relief on the ground that petitioner's claims failed as a matter of law, see App. A. McCleskey v. Kemp, supra, 753 F.2d at 886, 894 -- we will not detail here the extraordinary procedures by which Baldus assured the accuracy and completeness of his data. A more thorough discussion of his methodology appears in Appendix E. Here it suffices to repeat the judgment of Dr. Berk, who evaluated their quality and soundness in light of his prior comprehensive review of sentencing research for the National Academy of Sciences:

[Baldus' studies] ha[ve] very high credibility, especially compared to the studies that [the National Academy of Sciences] ... reviewed. We review hundreds of studies on sentencing ... and there's no doubt that at this moment, this is far and away the most complete and thorough analysis of sentencing that's ever been done. I mean there's nothing even close.

(Tr. 1766).

The two Baldus studies show this: Georgia's post-<u>Furman</u> administration of the death penalty is marked by persistent racial disparities in capital sentencing -- disparities by race of the victim and by race of the defendant -- that are highly statistically significant and cannot be explained by any of the hundreds of offer sentencing factors for which Baldus controlled. (Tr. 726-28). Baldus' unadjusted figures reveal that Georgia capital defendants who kill white victims are eleven times more

likely to receive a death sentence than are those who kill black victims. Among all persons indicted for the murder of whites, black defendants receive death sentences nearly three times as often as white defendants: 22% to 8%. (DB 63). Baldus testified that his expert opinions did not rest upon these unadjusted figures, however. To the contrary, he subjected his data to a wide variety of increasingly sophisticated analytical methods, employing dozens of models of varying complexity to determine whether plausible factors other than race might explain the gross. racial disparities. (Tr. 734; see, e.g., DB 78, 79 80, 83, 98; GW 4). They did not. Rather, the race of the defendant and the race of the victim proved to be as powerful determinants of capital sentencing in Georgia as many of Georgia's statutory aggravating circumstances. (See DB 81). The race of the victim, for example, counts as much in practice toward increasing the likelihood of a death sentence as whether the defendant has a prior murder conviction, or whether he is the prime mover in the homicide. (See DB 81). The race of the defendant proves more important than a history of drug or alcohol abuse, or whether the defendant is under age 17. (Id).

To quantify the effect of race on capital sentences in Georgia, Baldus employed a variety of additional procedures, among them the "index method," an application of the well-recognized statistical technique of crosstabulation. In indexing the cases, he first sorted the cases into eight groups, according to their overall "level of aggravation." (Tr. 876-79). He then analyzed the racial disparities that appeared within each group of increasingly more aggravated cases. Some ninety percent of the cases fell into groups in which almost no one received a

death sentence. In these groups, naturally, since nearly every defendant was given a life sentence, no racial disparities appeared. (Tr. 878-79; see DB 89).

Yet when Baldus took the two most aggravated groups, containing approximately 400 cases, and subdivided them into eight subgroups, gross racial disparities became crystal clear. Baldus found dramatic, persistent differences by race of the victim (compare especially columns C and D):

A	В	c	D	E	
Predicted Chance of a Death Sentence	Average Actual Sentence- ing Rate for the	Death Sentencing Rates for Black Defendants Involving		Arithmetic Difference in Rate of the Victim Rates	
1 (least) to 8 (highest	Cases at Each Level	White Victim Cases	Black Victim Cases	(Col. C - Col. D)	
1	(0/33)	(0/)	(0/19)	.0	
2	.0 (0/55)	(0/8)	(0/27)	.0	
3	.08 (6/76)	.30 (3/10)	.11 (2/18)	.19	
. 4	.07 (4/57)	.23 (3/13)	(0/15)	.23	
5	.27 (15/58)	.35 (9/26)	(2/12)	.18	
6	(11/64)	.38	.05 (1/20)	.33	
7	.41 (29/71)	.64 (9/14)	.39 (5/13)	.25	
8	.88 (51/58)	.91	.75 (6/8)	.16	

(DB 90), and by race of the defendant:

	В	c	D	E	
Predicted Chance of a Death Sentence 1 (least)	Average Actual Sentence- ing Rate for the	Death Sentencing Rates for White Victims Involving		Arithmetic Difference in Race of the Defen-	
to 8 (highest	Cases at Each Level	Black Defendants	White Defendants	(Col. C - Col. D)	
1	(0/33)	(0/9)	(0.5)	.0	
2	.0 (0/55)	(0/8)	(0/19)	.0	
3	.08 (6/76)	(3/10)	.03 (1/39)	.27	
4	.07 (4/57)	(3/13)	(1/29)	.19	
5	.27 (15/58)	.35 (9/26)	.20 (4/20)	* .15	
6	(11/64)	(3/8)	.16 (5/32)	.22	
7	.41 (29/71)	.64 (9/14)	.39 (15/39)	.25	
8	.88 (51/58)	.91 (20/22)	.89	.02	

(DB 91).

Baldus observed that, even among these 400 cases, little disparity appeared in the less aggravated cases. "[B]ut once the [overall] death sentencing rate begins to rise, you'll note that it rises lirst in the white victim cases. It rises there more sharply than it does in the black victim cases." (Tr. 882-83.) As Judge Clark noted in his opinion below:

Race is a factor in the system only where there is room for discretion, that is, where the decision maker has a viable choice. In the large number of cases, race has no effect. These are the cases where the facts are so mitigated the death penalty is not even considered as a possible punishment. At the other end of the spectrum are the tremendously aggravated murder cases where the defendant will very probably receive the death penalty, regardless of his race or the race of the victim. In between is the mid-range of cases

where there is an approximately 20% racial disparity.

App. A., 753 F.2d at 920 (Clark, J., dissenting in part & concurring in part). (See Tr. 865-71; 882-85).

In addition to the index method, Baldus used a variety of multiple regression techniques to calculate the effects of race on Georgia capital sentences. As he explained, multiple regression analyses permit one to measure the <u>average</u> impact of a single factor (or "variable"), such as the race of the defendant, across all of the cases. The "regression coefficient" describes the average effect of that factor, after adjusting for (or "controlling" for) the cumulative impact of all other factors considered. For example, a coefficient of .06 indicates that the presence of that factor in a case would increase the likelihood of a death sentence by an average of six percentage points.

Baldus conducted a wide array of such analyses, employing dozens of combinations of variables (or "models") designed to include the various important factors which may enter into capital sentencing determinations. Among these factors were statutory and nonstatutory aggravating circumstances, mitigating circumstances and variables relating to the strength of the evidence. Some models employed all 230 of Baldus' factors (see DB 83); one was specifically designed by the District Court, at petitioner's invitation, to reflect those factors which the court judged most appropriate and influential in determining capital sentencing outcomes. (Tr. 810; 1426; 1475-76; see Court's Ex. 1). All showed race-of-victim disparities, virtually all of

It is important to realize that this does not mean a six percent increase but a six percentage point increase. Thus, for example, if the overall likelihood of a death sentence in a given category of cases is .05, or 5-in-100, a .06 coefficient for the factor "white victim" would mean a six point increase in the likelihood of death for such cases, to .11, or 11-in-100. That would, of course, amount to a 120 percent increase in the likelihood that a death sentence would be imposed.

which were highly statistically significant. Many showed race-of-defendant disparities as well. For example, DB 83 reflected the following results:

## W.L.S. REGRESSION RESULTS

	A .	В	c	
Non-Racial Variables in		Coefficients and Level of Statistical Significance		
	The Analysis	Race of Victim	Race of Defendant	
a)	230 + aggravating, mitigating, evi- dentiary and sus- pect factors	.06 (.02)	.06 (.02)	
b)	Statutory aggravat- ing circumstances and 126 factors derived from the entire file by a factor analysis	(.01)	.06	
c)	44 non-racial vari- ables with a sta- tistically signifi- cant relationship (P<.10) to death sentencing	.07 (.0002)	.06 (.0004)	
<b>a</b> )	14 legitimate, non- arbitrary and sta- tistically (P'.10) significant rac- tors screened with W.L.S. regression procedures	.06	(.001)	
e)	13 legitimate, non- arbitrary and sta- tistically signifi- cant (P<.10) fac- tors screened with logistic regression procedures	(.001)	.05	

(DB 83).

Statistical significance, Baldus explained, is a measure of the likelihood that disparate results could be observed in a sample of cases merely by chance if, in the capital sentencing system as a whole, there are in fact no disparities as large as those observed in the sample. (Tr. 712-15). As conventionally expressed in "probability" or "p" values, a figure of .05 means that the likelihood of a chance finding is 5-in-100; a "p" of .01, 1-in-100. The "p" values in the table above appear in parentheses beneath each coefficient.

The Court of Appeals seized upon the .06 coefficient reported by Baldus for his 230-plus model in DB 83 as the best measure of the overall impact of the race of the victim on capital sentencing outcomes. See App. A., 753 F.2d at 896. This .06 average includes those 90 percent of Georgia cases in which the aggravation level is so low that death sentences are virtually never imposed, as well as the highly aggravated cases in which nearly everyone receives a death sentence. In almost none of these low- and high-aggravation cases do racial disparities appear to be of any consequence. Thus the .06 overall average obviously reflects extraordinarily strong racial disparities within that class of cases in which a choice between a life sentence and a death sentence is a serious option for the jury.

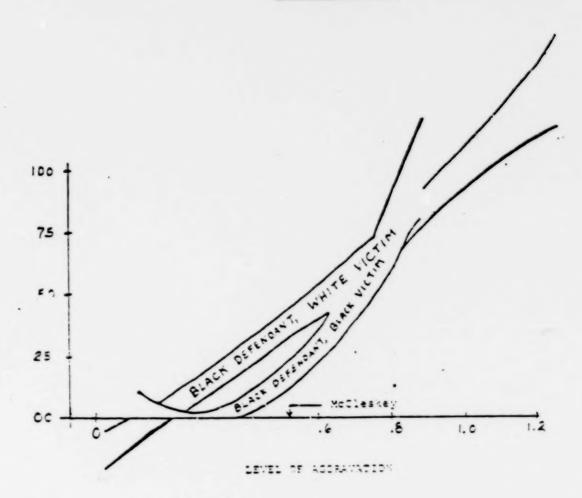
The average race-of-victim disparity among those so-called "midrange" cases, which comprise the bulk of the 400 most serious cases reflected in Baldus' index analysis (see page 19 supra), is roughly a twenty percentage point difference. (Tr. 1738-40). In other words, if the average death sentencing rate in the midrange is fifteen out of one hundred, the circumstances of a white victim increases the likelihood to thirty-five out of one hundred.

Petitioner introduced a figure illustrating the sentencing rates among black defendants by race-of-victim:

#### [insert GW 8 here]

(GW 8). Not only does GW 8 reflect a .20 average disparity in the midrange of cases; it demonstrates, as Dr. Woodworth testified without contradiction, that petitioner McCleskey's own crime

Figure 2: Midrange Model With Interactions and Nonlinearities--Black Defendents



<sup>2/</sup> The curves represent 95% confidence bounds on the average death sentencing rate at increasing levels of aggravation (redrawn fro computer output).

falls in the middle of the midrange. In fact, after reviewing the results of three separate statistical techniques, Dr. Woodworth was able to conclude:

[A]t Mr. McCleskey's level of aggravation the average white victim case has approximately a twenty percentage point higher risk of receiving the death sentence than a similarly situated black victim case.

(Tr. 1740).

0

Petitioner offered additional evidence, some of it statistical and some non-statistical, to identify more precisely the likely impact of Georgia's pervasive racial disparities on petitioner McCleskey's case. First, Baldus reported upon his analysis of data from Fulton County, where petitioner was tried. He testified that his performance of progressively more sophisticated analyses for Fulton County, similar to those he had employed statewide, "show a clear pattern of race of victim disparities in death sentencing rates among the cases which our analyses suggested were death eligible." (Tr. 983; see also 1043-44).

To supplement this statistical picture, Baldus examined a "cohort" of 17 Fulton County defendants arrested and charged, as was petitioner, with homicide of a police officer during the 1973-1979 period. Only two among the seventeen, Baldus found, even went to a penalty trial. One, whose police victim was black, received a life sentence. (Tr. 1050-62; DB 116). Petitioner, whose police victim was white, received a death sentence. Although the numbers were small and therefore require caution, "the principal conclusion that one is left with," Baldus testified, "is that ... this death sentence that was imposed in McCleskey's case is not consistent with the disposition of cases involving police officer victims in this county." (Tr. 1056).

Baldus conducted a second cohort study, examining the facts of those cases in Fulton County that scored nearest to petitioner McCleskey in their overall level of aggravation ("near neighbors" cases). (Tr. 986-91). After sorting the 32 closest into typical, more aggravated and less aggravated cases, employing a qualitative measure (Tr. 991), Baldus computed death sentencing rates for the cases broken down by race of victim and race of defendant. Within petitioner McCleskey's group, the difference in treatment by race of the victim was forty percentage points. (Tr. 993).

In sum, most of Baldus' many measures revealed strong, statistically significant disparities in capital sentencing in Georgia homicide cases, based upon the race of the victim. (Tr. 726-28). Race-of-defendant disparities also regularly appeared, although not with the invariable consistency and statistical significance of the victim statistics. Id. In response to the District Court's question whether he could "say that what caused McCleskey to get the death penalty ... was the fact that he murdered a white person," (Tr. 1085), Baldus concluded:

No, I can't say that was the factor. No. But what I can say, though, is when I look at all the other legitimate factors in his case, and I look to the main line of cases in this jurisdiction, statwide, that are like his, particularly the way B2 cases? and cases involving officer victims are disposed of in this jurisdiction, his case is substantially out of line with the normal trend of decision on such cases ... I can't see any factors, legitimate factors in his case that would clearly call for it, that would distinguish it clearly from the other cases ... So you're left with what other factor it might be, and what I can say, and what I do say is that the racial factor is possibly the thing that made the difference in the case. [A] real possibi-

The reference is to former Ga. Code Ann. § 27-2534.1(b)(2), which designates as an aggravating circumstance that "[t]he offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony." Petitioner's jury was charged on this aggravating circumstance.

lity in my estimation, that that's what made the difference. But I can't say with any, I can't quantify the likelihood that that is true. That's as far as I think I can go in terms of making responsible judgment.

(Tr. 1085-86).

In response to petitioner's submission, the State did not point to any analysis by Baldus in which the racial disparities disappeared or ran counter to petitioner's claims. The State offered no alternative model which might have reduced or eliminated the racial disparities. (Tr. 1609). The State did not even propose -- much less test the effect of -- any additional "explanatory variables," such as factors related to the crime, the victim, or the defendant. (Id.) Indeed, it admitted that it did not know whether the addition of any such factors "would have any effect or not." (Tr. 1567).

The State performed no multivariate analyses of its own to determine whether black and white victim or defendant cases were being treated differently in the State of Georgia. (Tr. 1615). Indeed, the State even declined an offer made by petitioner during the hearing to take any alternative factors proposed by the State, have petitioner's experts calculate their effects, and determine whether the results might reduce or eliminate the racial effects observed by Baldus. (Tr. 1475-76). In short, the State presented no affirmative rebuttal case at all.

The State's principal expert did offer one hypothesis in rebuttal: that Georgia's apparent racial disparities could be explained by the generally more aggravated nature of white-victim

What the State did do was to attempt to attack the integrity of the sources of petitioner's data -- data gathered by petitioner's experts with the cooperation of state officials from the files of the Supreme Court of Georgia, the Georgia Department of Pardons and Paroles, and the Georgia Department of Corrections. Petitioner's detailed description of the data-gathering methods, and his factual comment on the State's challenges to them, appear in Appendix E.

cases. However, that expert never addressed the factual question critical to his own theory -- whether white- and black-victim cases at the same level of aggravation are treated similarly, or differently by the State of Georgia. (Tr. 1664). He merely acknowledged on cross-examination that to do so "would have been desirable." (Tr. 1613). Petitioner's experts did then address this hypothesis directly. (Tr. 1297; 1729-32). After testing it thoroughly (Tr. 1291-96; see GW 5-8; DB 92), they were able to demonstrate without contradiction that it could not explain Georgia's racial disparities in capital sentencing. (Tr. 1732).

# 4. The Opinion of the Court of Appeals

In its opinion, the Court of Appeals does not quarrel with the factual findings of petitioner's studies. To the contrary, it expressly "assum[es] the validity of the research," App. A., 753 F.2d at 886, and "that it proves what it claims to prove." Id. See also id. at 894. The Court instead rejects petitioner's claims as a matter of law, concluding that Baldus' findings "would not support a decision that the Georgia law was being unconstitutionally applied, much less ... compel such a finding, the level which petitioner would have to reach in order to prevail on this appeal." Id. at 886-87.

The legal analysis producing this result proceeds on two principal fronts. First, the Court holds that the proof required to prevail on an Eighth Amendment claim, at least when race is al eged to have played a part in the sentencing system, is not substantially distinguishable from the proof of intentional discrimination required to establish an equal protection claim. Id. at 891-92. The Court admits that "cruel and unusual punishment cases do not normally focus on the intent of the governmental actor," id. at 892, but reasons that "where racial discrimination is claimed, not on the basis of procedural faults or flaws

in the structure of the law, but on the basis of decisions made within [the capital sentencing] process, then purpose, intent and motive are a natural component of the proof that discrimination actually occurred." Id. "We, therefore, hold," the Court concluded, "that proof of a disparate impact alone is insufficient to invalidate a capital sentencing system, unless ... it compels a conclusion ... of purposeful discrimination -- i.e., race is intentionally being used as a factor in sentencing...."

Id.

Turning to petitioner's Fourteenth Amendment challenge and to his statistical case under both the Eighth and Fourteenth Amendments, the Court addresses and resolves, in novel fashion, a host of important legal issues: (i) the proper limits of statistical evidence in proving intent; (ii) the utility of multiple regression analysis; and (iii) the proper prima facie burden to place on a petitioner alleging intentional discrimination, including: (a) the magnitude of disparity that must be shown; (b) the extent to which other variables must be anticipated and accounted for; (c) the need to identify those specific actors who have intentionally discriminated; and (d) the need to prove individual injury. The Court creates as well a new rule for cases where, as here, gross disparities appear larger in one portion of the system (the "midrange") than in the system as a whole. Finally, it sets forth a standard to be employed by the lower courts in determining whether evidence of racial discrimination in capital sentencing warrants an evidentiary hearing. We will briefly review each of these holdings.

The majority opinion acknowledges that "[t]o some extent a broad issue before this Court concerns the role that social science is to have in judicial decisionmaking." Id. at 887. In addressing that theme, the Court expresses deep skepticism about the power of statistical evidence, especially to prove intent.

"If disparate impact is sought to be proved," the Court reasons, "statistics are more useful than if the causes of that impact must be proved. Where intent and motivation must be proved, the statistics have even less utility." Id. at 888. Although it cites prior holdings that "'statistics alone ... under certain limited circumstances ... might [establish intentional discrimination], '" id., the Court's basic instinct is clearly that "[t]o utilize conclusions from such research to explain the specific intent of a specific behavioral situation goes beyond the legitimate uses for such research." Id. "The lesson ... must be that generalized statistical studies are of little use in deciding whether a particular defendant has been unconstitutionally sentenced to death." Id. at 893.

The Court's reservations about the ultimate utility of statistical evidence are directly related to the extraordinary prima facie standard it sets for a petitioner who would prove intentional discrimination. It is not sufficient, the Court holds, to offer proof that such discrimination is more likely than not:

[P]roof of a disparate impact alone is insufficient to invalidate a capital sentencing system unless that impact is so great that it compels a conclusion that the system is

<sup>31</sup> The Court also appears to reject the fundamental property of regression analysis: its ability to measure the independent impact of a particular variable on the operation of a system as a whole and reflect that impact in a coefficient. For example, the Court states: "The Baldus study statistical evidence does not purport to show that McCleskey was sentenced to death because of either his race or the race of his victim. It only shows that in a group involving blacks and whites, all of whose cases are virtually the same, there would be more blacks meceiving the death penalty than whites and more murderers of whites receiving the death penalty than murderers of blacks. The statisticians 'best guess' is that race was a factor in those cases and has a role in the sentencing structure in Georgia." Id. at 895. Similarly, at another point, the Court finds: "[T]he 20% disparity in this case does not purport to be an actual disparity. Rather, the figure reflects that the variables included in the study do not adequately explain the 20% disparity and that the statisticians can explain it only by assuming the racial effect." Id. at 898.

unprincipled, irrational, arbitrary and capricious such that purposeful discrimination ... can be presumed to permeate the system.

Id. at 892 (emphasis added). The Court repeatedly insists that the "disparity [be] .... sufficient to compel a conclusion that it results from discriminatory intent and purpose," id. at 893.

See also id. at 886-87. It occasionally phrases the prima facie burden alternatively as a showing "of racially disproportionate impact ... so strong as to permit no inference other than that the results are the product of a racially discriminatory intent or purpose." Id. at 889 (emphasis added). See id. at 890.

The Court quickly clarifies, however, that even unquestioned proof that a racial disparity does exist will not suffice to prove a constitutional violation unless the disparity can be shown to be of a sufficient magnitude: "The key to the problems lies in the principle that the proof, no matter how strong, of some disparity is alone insufficient." Id. at 894. Turning to the six percentage point overall difference demonstrated in Georgia's capital sentencing system, the opinion concludes that,

disc.

even if "true, this figure is not sufficient to overcome the presumption that the statute is operating in a constitutional 32 manner." Id. at 897.

The Court stops short, however, of declaring that the 20 point disparity Baldus reported for the midrange of cases is likewise insufficient. Instead the Court complains that "Baldus did not testify that he found statistical significance in the 20% 33 disparity figure, and that "he did not adequately explain the rationale of his definition of the midrange of cases ... leav-[ing] this Court unpersuaded that there is a rationally classified, well-defined class of cases in which it can be demonstrated that a race-of-victim effect is operating with a magnitude approximately 20%." Id. at 898.

Beyond its insistence that a <u>prima facie</u> showing must include racial disparities of a large, though unspecified, magnitude, the Court of Appeals also appears to suggest that no statistical analysis can be fully adequate if it fails to account for every factor that might conceivably affect sentencing outcomes. The Court faults Baldus' studies, despite their inclusion of over 230 possible sentencing considerations, because his "approach ... ignores quantitative [sic] differences in

The Court of Appeals grounds its holding in part upon this Court's disposition of stay applications in three capital cases from Florida -- Sullivan v. Wainwright, U.S., 78 L.Ed.2d 210 (1983); Wainwright v. Adams, U.S., 80 L.Ed.2d 809 (1984); and Wainwright v. Ford, U.S., 82 L.Ed.2d 911 (1984). Noting that the study proffered in those cases reported a disparity similar to one of Baldus' findings, the Court concludes that "it is reasonable to suppose that the Supreme Court looked at the bottom line indication of racial effect [in the Florida study] and held that it simply was insufficient to state a claim." Id. at 897. From that speculation, the majority proceeds to a conclusion that all of the disparities reported by Baldus are insufficient.

<sup>33</sup> In fact, the table from which this figure is derived indicates that it is statistically significant at the .01 level. (See DB 90 n.1).

But see Tr. 879-85 for Professor Baldus' testimony on this point.

cases: looks, age, personality, education, profession, job, clothes, demeanor, and remorse, just to name a few," <a href="id">id</a>. at 899, and is "incapable of measuring qualitative differences of such things as aggravating and mitigating factors." <a href="Id">Id</a>. "Generalized studies," the Court states,

would appear to have little hope of excluding every possible factor that might make a difference between crimes and defendants, exclusive of race. To the extent there is a subjective or judgmental component to the discretion with which a sentence is invested, not only will no two defendants be seen identical by the sentencers, but no two sentencers will see a single case precisely the same. As the court has recognized, there are 'countless racially neutral variables' in the sentencing of capital cases."

Id. at 894 (citing <u>Smith v. Balkcom</u>, 671 F.2d 858, 859 (5th Cir. Unit B 1982).

After thus reiterating the theme that capital cases are routinely affected by a myriad of objective and subjective considerations, some of them too intangible to be recorded, the Court in its next thought appears to require a death-sentenced petitioner to demonstrate that particular actors in his own case possessed the specific intent to discriminate, and that their conscious racial biases brought about his sentence. See App. A., 753 F.2d at 892, 894. We have earlier pointed out the Court's concern for proof of malignant intent. Its insistence on proof of the causal connection between such intent and the death sentence under attack seems equally clear. The Court several times identifies as a "limitation" of the Baldus studies that "[t]here was no suggestion that a uniform, institutional bias existed that adversely affected defendants in white victim cases in all circumstances, or a black defendant in all cases." Id. at 887. Lacking this, the Court demands and fails to find evidence of racial animus in McCleskey's individual case. It notes that "[t]he Baldus study statistical evidence does not purport to show that McCleskey was sentenced to death because of either his race or the race of his victim." Id. at 895. And its ultimate conclusion is that:

[t]he statistics alone are insufficient to show that McCleskey's sentence was determined by the race of his victim, or even that the race of his victim contributed to the imposition of the penalty in his case.

McCleskey's petition does not surmount the threshold burden of stating a claim on this issue. Aside from the statistics, he presents literally no evidence that might tend to support a conclusion that the race of McCleskey's victim in any way motivated the jury to impose the death sentence in his case.

Id. at 898.

The same or similar principles lead the Court of Appeals to announce at least two additional major holdings. First, "assuming arguendo ... that the 20% disparity [in midrange cases like petitioner's] is an accurate figure," id. at 89%, the Court holds that "a disparity only in the midrange cases, and not in the system as a whole, cannot provide the basis for a systemwide challenge.... A valid system challenge cannot be made only against the midrange of cases." Id. Second, the Court holds that "a court faced with a request for an evidentiary hearing to produce future studies" on racial discrimination need not grant a hearing unless there is evidence that "a particular defendant was discriminated against because of his race," something the Court admits that "general statistical studies ... do not even purport to prove." Id. at 894.

### B. Petitioner's Giglio Claim

Petitioner McCleskey was convicted and sentenced to death for his part in an armed robbery of the Dixie Furniture Company in Atlanta, and the murder of police officer Frank Schlatt during the course of that robbery. Pour robbers entered the store. When Officer Schlatt, summoned by a silent alarm, came in through the front door, he was shot and killed. Shortly after the crime, petitioner confessed to participating in the robbery but insisted he had not fired the fatal shots.

Two witnesses at petitioner's trial asserted that petitioner had admitted shooting the officer. One was Ben Wright, a co-defendant -- himself a possible suspect in the shooting. The other was Officer Evans, a federal prisoner who had been incarcerated with McCleskey prior to trial. Evans told the jury that McCleskey had confessed to shooting Officer Schlatt, and had said he would have done the same thing if it had been twelve police officers. Evans' testimony was the centerpiece of the prosecutor's argument to the jury that McCleskey committed the shooting with malice. (R. 1222).

At the time of his testimony, Evans was under federal escape charges. An Atlanta Police Department detective had promised Evans that he would "speak a word" to the federal authorities for Evans in return for Evans' testimony againt McCleskey. St. Hab. Tr. at 122, quoted in App. A., 753 F.2d at 883. After McCleskey's trial, McCleskey's prosecutor advised federal officials of Evans' cooperation, and the escape charges were dropped. Id.

The District Court below found that Evans' trial testimony concerning his understanding with the Atlanta police was false and evasive. The misleading testimony began as follows:

Q: You do have an escape charge still pending, is that correct?

E.

- A: Yes, sir. I've got one, but really it ain't no escape, what the peoples out there tell me, because something went wrong out there so I just went nome. I stayed at home and when I called the man and told him that I would be a little late coming in, he placed me on escape charge and told me there wasn't no use of me coming back, and I just stayed on at home and he come and picked me up.
- Q: Are you hoping that perhaps you won't be prosecuted for that escape?
- A: Yeah, I hope I don't but I don't -- what they tell me, they ain't going to charge me with escape no way.

(Trial Tr. 868-68). Evans thus described his escape from a federal halfway house in Atlanta as nothing more than a misunderstanding between himself and the halfway house administrators—nothing for which Evans feared or need fear prosecution. His testimony on this point is directly contradicted by federal records detailing the circumstances surrounding the escape. He was asked specifically by the prosecutor whether he had sought or received from the prosecutor any promises concerning the escape charge, and he said no. As the District Court found, the jury was left with the impression from Evans' testimony that no promises had been made to him concerning the escape charge in exchange for his cooperation in the McCleskey prosecution. (R. 1220). His testimony on direct examination in the trial court was as follows:

- Q: [Assistant District Attorney] Have you asked me to try to fix it so you wouldn't get charged with escape?
- A: No, sir.
- Q: Have I told you I would try to fix it for you?

Those records show that Evans had been told by federal personnel that disciplinary measures would be taken against him because of his use of drugs. In describing his activities during his escape, Evans had told federal prison authorities that he had gone to Florida as part of an investigation dealing with drugs, and that he expected to be well paid for his part. (R. 333, R. 1206).

A: No, sir.

(Trial Tr. 868-69). And on cross-examination Evans expanded upon these protestations:

- Q: Okay. Now, were you attempting to get your escape charges altered or at least worked out, were you expecting your testimony to be helpful in that?
- A: I wasn't worrying about the escape charge. I wouldn't have needed this for that charge, there wasn't no escape charge.

(Trial Tr. 882). That testimony was directly contradicted by Evans' subsequent testimony in State habeas corpus proceedings that "the Detective told me that he would -- he said he was going to do it himself, speak a word for me. That was what the Detective told me." (St. Hab. Tr. at 122).

C. Petitioner's Claim Under Sandstrom v. Montana and Francis v. Pranklin

During its charge to the jury at the close of the guilt-orinnocence phase of petitioner's trial, the trial court instructed the jury as follows:

One section of our law says that the acts of a person of sound mind and discretion are presumed to be the product of the person's will, and a person of sound mind is presumed to intend the natural and probable consequences of his acts, but both of these presumptions may be rebutted.

(Trial Tr. 996-97).

The full instructions appear in the District Court's opinion. App. B., 580 F. Supp. at 384-85 n.21.

After approximately two hours of deliberations, the jury returned to the courtroom and requested the trial court to give them further instructions on malice. (Trial Tr. 1007-09). The trial court then repeated his initial instructions on that element of the crime. (Id).

### D. Petitioner's Death-Qualification Claim

During voir dire, at least two prospective jurors, Ms. Barbara Weston and Mrs. Emma Cason, were excluded by the State for cause because of their conscientious or religious scruples against the death penalty, although neither stated that their views would preclude them from fairly judging petitioner's guilt or innocence. (Trial Tr. 98-99; 129-30). Defense counsel made timely objection to the exclusion of both jurors. (Trial Tr. 98, 130).

### HOW THE PEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

A. Petitioner McCleskey alleged in his federal habeas corpus petition, filed in the District Court on December 30, 1981, that "[t]he death penalty is in fact administered and applied arbitrarily, capriciously and whimsically in the State of Georgia, and petitioner was sentenced to die and will be executed pursuant to a pattern of wholly arbitrary and capricious infliction of that penalty in violation of ... the Eighth and Fourteenth Amendments." (Fed. Habeas Pet. ¶ 45). He also alleged that "[t]he death penalty is imposed in this case pursuant to a pattern and practice ... to discriminate on the grounds of race

The full voir dire of each prospective juror appears in the District Court's opinion. App. B., 580 F. Supp. at 395 n.33.

... in the administration of capital punishment ... [in violation of] the Eighth Amendment and the due process and equal protection clauses of the Fourteenth Amendment." (Fed. Habeas Pet. ¶ 51).

The District Court held that "the Eighth Amendment issue has been resolved adversely to [petitioner] in this circuit," based upon prior precedent, App. B., 580 F. Supp. at 346. It rejected petitioner's Fourteenth Amendment claim after extensive discussion on the ground that "petitioner's statistics do not demonstrate a prima facie case." Id. at 379.

On appeal, petitioner contended that in rejecting his Eighth Amendment claim, the District Court "misread both Gregg v. Georgia, [428 U.S. 153 (1976)] ... and Furman v. Georgia, 408 U.S. 238 (1972), upon which Gregg is grounded." (En Banc Brief at 25). Petitioner also maintained that his "comprehensive statistical evidence on the operation of Georgia's capital statutes ... constitutes just the sort of 'clear pattern, unexplainable on grounds other than race,' Arlington Heights v. Metropolitan Housing Authority, 429 U.S. 252, 266 (1977), that the Supreme Court has held to establish an Equal Protection violation." (En Banc Brief at 27). The Court of Appeals, as noted earlier, held that, even assuming the validity of petitioner's evidence, it would not suffice to prove an Eighth or Pourteenth Amendment violation. See App. A., 753 F.2d at 886-87.

B. Petitioner alleged in his federal habeas petition that "[t]he State's deliberate failure to disclose an agreement or understanding between the State and the jail inmate Offic Evans ... violated the due process clause of the Fourteenth Amendment. (Fed. Habeas Pet. ¶ 15). The District Court granted relief on this claim, holding that the "disclosure of the promise of favorable treatment and correction of the other falsehoods in

Evans' testimony could reasonably have affected the jury's verdict on the charge of malice murder." App. B., 580 F. Supp. at 384.

On appeal, petitioner defended the propriety of the District Court's ruling under the Due Process Clause. (En Banc Brief, 9-15). The Court of Appeals reversed, reasoning that "(1) there was no promise in this case, as contemplated by <u>Giglio</u>; and (2) in any event, had there been a <u>Giglio</u> violation, it would be harmless." App. A., 753 F.2d at 883.

"[t]he trial court's charge to the jury regarding presumption of intent contravened petitioner's due process rights under the Fourteenth Amendment." (Fed. Habeas Pet. ¶ 29). The District Court, conceding that "[t]he charge at issue ... is virtually identical to those involved in <a href="Franklin [v. Francis">Franklin [v. Francis</a>, 720 F.2d 1206 (11th Cir. 1983), <a href="aff-d">aff-d</a>, <a href="U.S.">U.S.</a>, <a href="53">53 U.S.L.W. 4495</a></a> (U.S. April 30, 1985)] and <a href="Tucker [v. Francis">Tucker [v. Francis</a>, <a href="723">723 F.2d 1504</a></a> (11th Cir. 1984), <a href="vacated and reh'g en banc pending">vacated and reh'g en banc pending</a>], <a href="chose">chose "to follow Tucker v. Francis</a>, "rather than <a href="Franklin">Franklin</a> and concluded that "the instruction complained of ... <a href="created only a permissive">created only a permissive</a> inference." <a href="App. B.">App. B.</a>, 580 F. Supp. at 387.

On appeal, petitioner contended that "[t]he jury instruction here created a mandatory presumption, and thus the District Court erred when it concluded that no <u>Sandstrom</u> violation was present."

(En Banc Brief at 24). The Court of Appeals reasoned that "in the course of asserting his alibi defense McCleskey effectively conceded the issue of intent, thereby rendering the <u>Sandstrom</u> violation harmless beyond a reasonable doubt." App. A., 753 F.2d at 904.

D. Petitioner alleged in his federal habeas petition that "[t]he trial court improperly excused two prospective jurors without adequate examination of their views regarding capital punishment in contravention of petitioner's Sixth, Eighth and Fourteenth Amendment rights." (Fed. Habeas Pet. § 82). The District Court held that "[p]etitioner's argument that the exclusion of death-scrupled jurors violated his right to be tried by a jury drawn from a representative cross section of his community has already been considered and rejected in this circuit. Smith v. Balkcom, 660 F.2d 573, 582-83 (5th Cir. Unit B 1981)." App. B, 580 F. Supp. at 396.

On appeal, petitioner urged the Court of Appeals to reconsider its prior holding in light of <u>Grigsby v. Mabry</u>, 569 F. Supp. 1273 (E.D. Ark. 1983), and <u>Keeten v. Garrison</u>, 578 F. Supp. 1164 (W.D.N.C. 1984). (En Banc Brief at 70). The Court of Appeals declined to do so, remarking that "[w]hatever the merits of [<u>Grigsby</u> and <u>Keeten</u>], they are not controlling authority for this Court." App. A., 753 F.2d at 901.

## REASONS FOR GRANTING THE WRIT

This case was dominated below by the petitioner's evidence that race continues to play a role in Georgia's capital sentencing system. We therefore turn first to the important legal issues related to petitioner's racial discrimination claim. Nevertheless, we commend to the Court's attention the additional constitutional questions posed by petitioner's case.

. . . .

No single national failing has more deeply tarnished the promise of our Constitution than our tortured history of tolerance for racial discrimination, especially in the administration of criminal justice. Whether embodied explicitly in the language of statutes -- slave codes, black codes, Jim Crow laws -- or reflected in customs and practices permitting "unjust and illegal discriminations between persons in similar circumstances, material to their rights," Yick Wo v. Hopkins, 118 U.S. 356, 374

(1886), the official acceptance of different treatment of persons according to their race has compromised everything we as a nation profess about equal justice under law.

In the past three decades, the nation has, by addressing its racial problems, achieved subtantial progress toward ridding our public life of the taint of racial injustice. And hardwon achievements have come only when we have summoned the collective will to face facts, and deal directly with the hard problems posed by those facts.

At the time of Furman v. Georgia, 408 U.S. 238 (1972), this Court appeared deeply troubled by the perception, "based on ... almost daily exposure to the facts and circumstances of hundreds and hundreds of federal and state criminal cases involving crimes for which death is the authorized penalty," 408 U.S. at 313 (White, J., concurring), that America's capital punishment statutes, though fair on their face, were in practice so pervasively infected with racial bias that the death sentence was "wantonly and ... freakishly imposed." 408 U.S. at 310 (Stewart, J., concurring). The decision in Furman gave states an opportunity to fashion new laws, statutes that all hoped might "minimize the risk of wholly arbitrary and capricious" sentencing. Gregg v. Georgia, supra, 428 U.S. at 188. When in 1976, the Court upheld the new laws on their face, it did so on the assumption that their procedures would suffice to eliminate old problems. To indulge that assumption was appropriate: state statutes properly come before the Court with a strong presumption of constitutionality, and the Court -- as Justice White wrote -- was therefore unwilling "to interfere with the manner in which Georgia has chosen to enforce such laws on what is simply an assertion of a lack of faith in the ability of the system of justice to operate in a fundamentally fair manner." Gregg v. Georgia, supra, 428 U.S. at 226 (White, J., concurring in the judgment).

profoundly different from a mere "assertion of a lack of faith."

Through the work of Professor Baldus and his colleagues, petitioner has adduced proof that, despite Georgia's revised procedures, race continues to play an important part in determining which Georgia capital defendants will live and which will die.

Baldus' studies constitute the most thorough and illuminating research into capital sentencing undertaken in this generation.

Their message is unequivocal: the influence of race is real, it is persistent, and it operates as powerfully as many of Georgia's statutory aggravating circumstances.

The opinion of the Court of Appeals below assumes petitioner's studies to be valid. It thus accepts that racial factors are systematically at work in Georgia's capital system, determining life and death. Yet it declares that the Constitution remains unimplicated by these facts. In reaching this extraordinary conclusion, the Court of Appeals articulates several principles that independently warrant certiorari, among them: (i) that Eighth Amendment claims of racial discrimination and arbitrariness must hereafter be accompanied by proof of specific intent or motive; (ii) that condemned inmates challenging racial discrimination in the administration of a state's capital sentencing system must produce, as part of their prima facie case, statistical proof so strong that it not only "compels a conclusion" of discriminatory intent but addresses every possible sentencing variable so as to establish that "purposeful discrimination ... can be presumed to permeate the system" and to have motivated the actors involved in each particular case; and (iii) that future factual hearings will not be warranted by "generalized statistical studies," no matter how powerful, unless they can demonstrate that the particular inmate's death sentence was brought about by conscious racial bias.

The Court should grant certiorari to examine each of these subtantial departures from prior law. But more fundamentally, review is warranted to determine whether the Court below, by erecting artificially high burdens of proof and barriers to relief, has effectively closed off the troubling subject of racial discrimination from appropriate constitutional review. A full examination of petitioner's charges of racial discrimination in Georgia's capital sentencing system would not be painless; but in the long run it would prove more healthy, and more consistent with our constitutional commitment to equal justice under law, than avoiding the problem by refusing to see it.

This country's interests would not be well served by another Plessy v. Ferguson; the administration of capital statutes cannot afford a second <u>Dred Scott</u>. Yet at bottom, the holding in <u>McCleskey v. Kemp</u> appears to be just that: systematic racial discrimination in capital sentencing -- at least <u>some</u> level of discrimination -- can and will be tolerated. The jurisdiction of this Court extends to very few questions more important than this one.

I.

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER A CONDEMNED INMATE WHO CAN DEMONSTRATE SYSTEMATIC RACIAL DIFFERENCES IN CAPITAL SENTENCING OUTCOMES MUST ALSO PROVE SPECIFIC INTENT OR PURPOSE TO DISCRIMINATE IN ORDER TO ESTABLISH AN EIGHTH AMENDMENT VIOLATION

The primary focus of this Court's Eighth Amendment concern in capital cases has always been upon the <u>results</u> of the sentencing process: the Eighth Amendment is violated if "there is no meaningful basis for distinguishing the few cases in which [capital punishment] ... is imposed from the many cases in which it is not." Furman v. Georgia, 408 U.S. 238, 313 (1972) (White,

J., concurring); id. at 256 (Douglas, J., concurring) ("[t]he high service rendered by the 'cruel and unusual' punishment clause ... is to require legislatures to write penal laws that are evenhanded, nonselective, and nonarbitrary, and to require judges to see to it that general laws are not applied sparsely, selectively, and spottily to unpopular groups").

Such a focus is natural, for the arbitrariness and capriciousness condemned in <u>Furman</u> are inherently deficiencies that can afflict a system irrespective of conscious choice or decision: to be "struck by lightning is cruel and unusual," <u>Furman v. Georgia</u>, <u>supra</u>, 408 U.S. at 309 (Stewart, J., concurring), regardless of whether one posits a malevolent deity or an indifferent universe.

Even when the Court's attention has turned toward matters of procedure, the ultimate aim has been to require procedures that will "minimize the risk of wholly arbitrary and capricious action." Gregg v. Georgia, 428 U.S. 153, 189 (1976) (opinion of Stewart, Powell & Stevens, JJ.). Accord Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (opinion of Stewart, Powell & Stevens, JJ.); Lockett v. Ohio, 438 U.S. 586, 601 (1978) (plurality opinion); Beck v. Alabama, 447 U.S. 625, 637-38 (1980); Eddings v. Oklahoma, 455 U.S. 104, 118 (1982) (O'Connor, J., concurring). The Eighth Amendment burden to ensure evenhanded sentencing outcomes rests clearly on the State: "if a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty." Godfrey v. Georgia, 446 U.S. 420, 428 (1980).

The Court of Appeals has now held that proof of arbitrary and capricious results are no longer sufficient to invoke Eighth Amendment protection -- at least if that caprice takes the form of racial discrimination. The Court acknowledges that "cruel and

unusual punishment cases do not normally focus on the intent of the governmental actor," App. A., 753 F.2d at 892, yet it reasons that where racial discrimination is the gravamen of a condemned inmate's complaint, intent and motive are a "natural component" of the proof that discrimination actually occurred. Id. Nothing in this Court's Eighth Amendment caselaw suggests that such a component is a necessary element of "a pattern of arbitrary and capricious sentencing like that found unconstitutional in Furman. Gregg v. Georgia, supra, 428 U.S. at 195 n.46 (opinion of Stewart, Powell & Stevens, JJ.). To the contrary, Justice Douglas in Furman expressly disclaimed the impossible "task ... [of] divin[ing] what motives impelled these death penalties." Furman v. Georgia, supra, 408 U.S. at 253. And the Court in Godfrey surely did not insist upon convicting either Godfrey's jury or the Georgia Supreme Court of conscious discriminatory animus.

Furman and its progeny seeks to guard is the unequal treatment of equals in the most important sentencing decision our society permits. Petitioner's studies have found that race plays an independent role in cases that are otherwise equal, after chance and over 230 other factors have been taken into account. Locating precisely where and how, consciously or unconsciously, race is influencing the literally thousands of actors involved in capital sentencing -- prosecutors, judges, jurors who assemble to make a single decision in a single case, only to be replaced by other jurors in the next case, and still others after them -- is manifestly impossible. Yet "[i]dentified or unidentified the results of the miconstitutional ingredient of race, at a significant level in the system, is the same on the black defendant. The

inability to identify the actor or agency has little to do with the constitutionality of the system." 753 F.2d at 919. (Hatchett, J., dissenting in part and concurring in part).

The Court should therefore grant certiorari to determine whether proof of discriminatory intent is necessary to establishing an Eighth Amendment claim when substantial racial disparities in sentencing outcome have been proven by petitioner and assumed by the Court of Appeals.

II.

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE EXTRAORDINARY STANDARD OF PROOF IMPOSED BY THE COURT OF APPEALS IN CASES INVOLVING STATISTICAL EVIDENCE OF DISCRIMINATION IN CAPITAL SENTENCING CONFLICTS WITH PRIOR DECISIONS OF THIS COURT OR THOSE OF OTHER CIRCUITS

In Washington v. Davis, 426 U.S. 229 (1976), and Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977), the Court held that under the Fourteenth Amendment, "official action will not be held unconstitutional solely because it results in a racially disproportionate impact.... Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." Arlington Heights, supra, 429 U.S. at 265-66. See, e.g., Hunter v. Underwood, \_\_\_\_\_ U.S. \_\_\_\_, 53 U.S.L.W. 4468, 4469 (U.S., April 16, 1985). Nevertheless, as Justice Stevens noted, "the burden of proving a prima facie case may well involve differing evidentiary considerations" depending upon the factual context in which the claim arises. Washington v. Davis, supra, 426 U.S. at 253. (Stevens, J., concurring). "[I]n the case of governmental action which is frequently the product of compromise, of collective decisionmaking, and of mixed motivation ... [i]t [would be] unrealistic ... to require the victim of alleged discrimination Id. Accord Arlington Heights, supra, 429 U.S. at 265; Hunter v. Underwood, supra, 53 U.S.L.W. at 4469.

In such contexts, the Court has demanded "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." Arlington Heights, supra, 429 U.S. at 266. "Necessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another. It is also not infrequently true that the discriminatory impact ... may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on nonracial grounds." Washington v. Davis, supra, 426 U.S. at 242. In a series of related cases, the Court has stressed the central role that statistical evidence may play in proving discriminatory intent. See, e.g., Hazelwood School District v. United States, 433 U.S. 299, 307 (1977); (Title VII case: "[w]here gross statistical disparities can be shown, they alone in a proper case constitute prima facie proof of a pattern or practice of discrimination"); Mayor of Philadelphia v. Educational Equality League, 415 U.S. 605, 620 (1973) (equal protection case: "statistical analyses have served and will continue to serve an important role as one indirect indicator of racial discrimination ... "). See also Castaneda v. Partida, 430 U.S. 482, 493-94 (1977).

The lower federal courts on whole have followed this Court's lead, admitting statistical evidence on the issue of discriminatory intent in a wide variety of appropriate contexts. See, e.g., EEOC v. Federal Reserve Bank of Richmond, 698 F.2d 633 (4th Cir. 1983); Wilkins v. University of Houston, 654 F.2d 388 (5th Cir. 1981), vacated and remanded on other grounds, 459 U.S. 809 (1982); EEOC v. Ball Corp., 661 F.2d 531 (6th Cir. 1981); Coble

v. Hot Springs School Distict No. 6, 682 F.2d 721 (8th Cir. 1982); Eastland v. TVA, 704 F.2d 613 (11th Cir. 1983); Segar v. Smith, 738 F.2d 1249 (D.C. Cir. 1984); Vuyanich v. Republic Nat'l Bank, 505 F. Supp. 224 (N.D. Tex. 1980), vacated on other grounds, 723 F.2d 1195 (5th Cir. 1984).

This Court has also outlined an appropriate order of proof in those cases in which discriminatory intent is at issue. The plaintiff is initially required to present a prima facie case, establishing discrimination by a preponderance of the evidence. The defendant may then explain or justify its conduct, or may seek to discredit the plaintiff's proof. Finally, the plaintiff may reply to the defendant's rebuttal, showing that the defendant's justifications or explanations do not defeat the inference of intent. See, e.g., Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981).

The Court of Appeals' opinion in this case is, to say the least, deeply inhospitable toward this Court's major teachings on the use of statistical evidence and on the appropriate uses of such evidence to establish a prima facie case. It is, moreover, inconsistent with the very concept of a prima facie case. For if, as the Court of Appeals held, a prima facie case of discrimination must be so overwhelming as to "compel a conclusion" of discriminatory intent -- if, as the Court of Appeals also held, it must anticipate and dispel in advance every merely possible non-racial explanation -- then the so-called "prima facie" case is logically irrebutable and required to be so.

The Court of Appeals' decision is also in direct conflict with many of the lower court decisions interpreting this Court's teachings. The lower federal courts, in statistical cases, have developed a series of criteria for establishing a prima facie

case of discriminatory intent. They have been virtually unanimous that a standard of perfection is neither attainable nor required.

"[A] plaintiff's initial proof must be measured against the more generalized function standard that the Supreme Court has elaborated in Teamsters v. [United States, 431 U.S. 324 (1977)] ... at 358; Furnco Construction Corp. v. Waters, 438 U.S. 567, 577 (1978) and Burdine, supra, 450 U.S. at 253-254. These cases hold that a sufficient prima facie case is made out when the plaintiff shows a disparity in the relative position or treatment of the minority group and has eliminated 'the most common nondiscriminatory reasons for the observed disparity.' Burdine, supra, 450 U.S. at 253-254."

Segar v. Smith, supra, 738 F.2d at 1273. See e.g., Vuyanich v. Republic Nat'l Bank, supra, 505 F. Supp. at 273-74.

Realistically, the standard of proof to which the Court of Appeals held petitioner is beyond the power of any party to meet. Minor refinements of Baldus' studies are certainly possible. A study that would, however, (i) account for every conceivable nonracial influence; (ii) eliminate all random factors; (iii) identify every malevolent actor; and (iv) demonstrate the quantitative impact of racially invidious intent on each condemned inmate's case, is simply not possible. The Court of Appeals offered no real justification for setting petitioner's burden so high; it is as if the Court inexplicably determined flatly to foreclose any further racial challenges to the application of capital statutes. Whether so meant or not, the opinion will undoubtedly have precisely that effect in practice.

The Court of Appeals' opinion reads more generally, however. The opinion does not purport to limit itself to capital cases: its potential reach appears to include all equal protection cases based upon statistical evidence. Yet its announced standards of proof conflict with virtually every other decided case involving

claims of racial discrimination. If racial discrimination in capital sentencing ought to be judged by the <u>same</u> standards applicable in other areas, this Court should grant certiorari to review an opinion so fundamentally out of line with dozens of circuit court decisions, and with the many opinions of this Court explicating the proper burden of proof for a party attempting to demonstrate discrimination.

If, on the other hand, racial discrimination in capital punishment is to be judged by some standard dramatically more strict than that applicable in other areas of the law, the Court should grant certiorari to say so clearly, and to explain the constitutional basis for such a distinction.

#### III.

THE COURT SHOULD GRANT CERTIORARI TO REVIEW THE COURT OF APPEALS' HOLDING THAT THE STATE'S NONDISCLOSURE OF AN INFORMAL PROMISE OF PAVORED TREATMENT DOES NOT IMPLICATE THE DUE PROCESS REQUIREMENT OF GIGLIO V. UNITED STATES

This case presents an important question of federal constitutional law on which, as the Court of Appeals noted, this Court has "never provided definitive guidance." App. A., 753 F.2d at 884). At issue is whether the due process clause, as interpreted by this Court in Napue v. Illinois, 360 U.S. 264 (1959), and Giglio v. United States, 405 U.S. 150 (1972), requires the State to correct false testimony of a key witness regarding the State's informal promises of favored treatment in exchange for the witness's testimony. Here, because the promise or understanding which existed between a police detective and the witness was an informal agreement, the Court of Appeals concluded that its nondisclosure to the jury did not infringe petitioner's due process rights. App. A., 573 F.2d at 884.

The Court of Appeals' decision on this question is contrary to that of a number of other circuits which have concluded that the due process clause is violated by the State's failure to correct false testimony regarding undisclosed promises of benefit, informal or tentative in nature. The rationale for the prevailing rule is stated in <a href="Boone v. Paderick">Boone v. Paderick</a>, 541 F.2d 447 (4th Cir. 1976). There, the Fourth Circuit considered the State's failure to correct false testimony regarding a promise by a police detective to "use his influence with the prosecuting attorney" regarding pending charges and concluded:

[R] ather than weakening the significance for credibility purposes of an agreement of favorable treatment, tentativeness may increase its relevancy. This is because a promise to recommend leniency (without assurance of it) may be interpreted by the promisee as contingent upon the quality of the evidence produced — the more uncertain the agreement, the greater the incentive to make the testimony pleasing to the promisor.

<u>Id. at. 451. Accord Campbell v. Reed</u>, 594 F.2d 4, 6 (4th Cir. 1979) (witness was advised that "everything would be all right").

The other Circuit Courts which have considered this question have all adopted the same rule espoused by the Fourth Circuit in Boone. E.g., DuBose v. Lefebre, 619 F.2d 973, 977 (2d Cir. 1980) (prosecutor agreed to "do the right thing" for witness regarding pending indictment); Blanton v. Blackburn, 494 F.Supp. 895, 901 (M.D. La. 1980), aff'd, 654 F.2d 719 (5th Cir. Unit A. 1980) (imprecise agreements reached with four of five key witnesses); United States v. Bigeleisen, 625 F.2d 203, 205 (8th Cir. 1980) (prosecutor agreed to "make witness's cooperation known to authorities"); United States v. Butler, 567 F.2d 885, 888 (9th Cir. 1978) (agents told witness "they were going to do everything

they could to help him"). Chief Judge Godbold, writing in dissent below, urged adoption of a rule similar to that applied by the other circuits:

The proper inquiry is not limited to formal contracts, unilateral or bilateral, or words of contract law, but "to ensure that the jury knew the facts that might motivate a witness in giving testimony."

App. A., 753 F.2d at 907.

The Eleventh Circuit's contrary rule that false testimony regarding an informal agreement by a government agent does not invoke Giglio is also inconsistent with this Court's precedent. The benefit offered to the witness in Napue was no more formalized or certain than the benefit offered to the witness in the 38 present case. The prosecutor told the witness in Napue that "'a recommendation for a reduction of his ... sentence would be made and, if possible, effectuated." Napue v. Illinois, 360 U.S. at 266. Napue makes clear that the due process clause applies to situations other than those involving false testimony regarding formal, unqualified agreements.

The Eleventh Circuit's description of the benefit offered to the witness as "marginal" in nature does not apparently refer to the fact that the promise was made by a police detective rather than a prosecutor. In Williams v. Griswald, 743 F.2d 1533 (11th Cir. 1984), the Eleventh Circuit has recently reaffirmed its long-standing rule, derived from this Court's decision in <a href="Pylev.Kansas">Pylev.Kansas</a>, 317 U.S. 213 (1942), that false testimony regarding a promise by a police officer contravenes the due process clause.

Napue, as well as the circuit court cases which have followed it, show that the informal nature of the promise to Office Evans is not a basis for holding the due process clause 39 inapplicable. This Court should grant certiorari to resolve the conflict in the circuits on this issue.

Relying on the fact that the jury was advised that Evans had a prior criminal record, the Court of Appeals alternatively held that the failure to correct his false testimony about the nature and circumstances of the pending escape charge and the State's promises concerning it was harmless error. That decision places the Eleventh Circuit in conflict with the Second Circuit's ruling in Annunziato v. Manson, 566 F.2d 410, 414 (2nd Cir. 1977), that under Napue and Giglio, "the jury should be informed that the witness hopes for leniency on current charges and that the prosecution has a present leverage over the fate of the witness." Informing jurors of a witness's past crimes does not indicate to the jury his present motivation to lie, which is the underlying

A subsequent decision of the Eleventh Circuit suggests that the "McCleskey rule is that Giglio does not apply unless there is more than one criminal charge pending against the witness, and, since the witness herein was facing 'a lone escape charge,' the due process clause afforded no protection." Haber v. Wainwright, 756 F.2d 1520, 1524 n.7 (11th Cir. 1985). Of course, such a rule is contrary to the facts and underlying purposes of Napue and Giglio. In Napue, the witness was offered a recommendation for reduction of his "lone" murder charge; a witness may obviously have a motive to lie when promised leniency on a single charge pending against him.

Nor is the Court's characterization of the promise as "marginal" justified if it is meant to refer to the potential sentence that Evans faced because of the escape charge pending against him. That charge carried a potential sentence of 5 years imprisonment and/or a \$5,000 fine. 18 U.S.C. § 751.

purpose of the Napue/Giglio line of cases. Just as the Eleventh Circuit failed to recognize that an informal agreement with the State can provide a witness with a motive to lie, so it failed to recognize that under the due process clause, a jury must be apprised of false sestimony which hid from the jury that motive to lie. Certiorari should also be granted on this aspect of the case.

IV.

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER IMPORTANT, UNRESOLVED QUESTIONS REGARDING HARMLESS ERROR UNDER SANDSTROM V. MONTANTA AND FRANCIS V. FRANKLIN

A majority of the Court of Appeals properly concluded that the trial court's instruction on the p. sumption of intent in this case was unconstitutional. It went on to hold, however, that "where the State has presented overwhelming evidence of an intentional killing and where the defendant raises a defense of nonparticipation in the crime rather than lack of mens rea, a

Again in dissent, Chief Judge Godbold noted the critical nature of witness Evans' testimony: "Co-defendant Wright was the only eyewitness. He was an accomplice, thus his testimony, unless corroborated, was insufficient [under Georgia law] to establish that McCleskey was the triggerman.... Evans is not a minor or incidental witness." Evans' testimony, describing what McCleskey "confessed to him, is the corroboration for the testimony of the only eyewitness, Wright." App. A., 753 F.2d at 907.

<sup>41</sup> The instruction given in petitioner's trial was indistinguishable from that found unconstitutional in <u>Francis v. Franklin</u>. The instruction reads, in relevant part:

One section of our law says that the acts of a person of sound mind and discretion are presumed to be the product of the person's will, and a person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts, but both of these presumptions may be rebutted.

App. B., 580 F. Supp. at 384 n.21 (emphasis omitted).

Sandstrom violation on an intent instruction such as the one at issue here is harmless beyond a reasonable doubt. App. A., 753
42
F.2d at 904.

This decision squarely raises the basic question left open in Connecticut v. Johnson, 460 U.S. 73 (1983), Koehler v. Engle,

U.S. \_\_\_\_, 80 L.Ed.2d 1 (1984), and Francis v. Franklin,

U.S. \_\_\_\_, 53 U.S.L.W. 4495 (U.S., April 30 1985): whether a jury charge that unconstitutionally shifts a burden of persuasion to the defendant on an essential element of an offense can ever be harmless. The facts of the case present a second question of importance and general applicability deriving from the first: whether, if "harmless error" ever does excuse a Sandstrom violation, it can do so where the defendant chooses to put the prosecution to its proof on the issue of intent, without conceding or addressing evidence directly to that issue, because he undertakes primarily to establish a defense of nonparticipation.

Here the charge was malice murder: killing with the requisite intent. McCleskey denied that he was the killer. The prosecution sought to prove his identity as the killer by circumstantial evidence, coupled with suspect testimony from a co-defendant and a jailhouse inmate that McCleskey had admitted the killing to them. The victim, a police officer, was shot at some distance after he had entered and half-crossed the floor of a store with a robbery in progress. No one saw the shooting. See App. B., 580 P.Supp. at 382.

Judge Johnson, writing for the dissenting judges, noted that the facts did not support the characterization of the evidence against petitioner as "overwhelming." No one saw the shooting; the murder weapon was never recovered; the shooting did not occur at pointblank range; and the officer was moving at the time of the shooting. App. A., 753 F.2d at 918.

In this situation, the question of the killer's intent remained very much at issue, whether McCleskey was or wasn't the killer. The prosecutor made lengthy arguments to the jury on the evidence regarding intent. (Trial Tr., 974-75). Defense counsel countered with arguments that "the defense doesn't have to prove anything to you" (Trial Tr., 909) and that the State's witnesses were not credible. (Trial Tr., 911, 921, 936, 938-39, 943, 948-49, 951, 952). The jury was charged -- and then, at its request, returned for reinstruction -- on the elements of malice murder. (Trial Tr. 1007). Its job was to decide whether each of those elements, including intent, was established by the evidence beyond a reasonable doubt. However, the unconstitutional instruction deemed "harmless" by the Court of Appeals permitted the jury to find intent without considering the evidence.

Reference to the "overwhelming" weight of the evidence as a test of harmless error is therefore singularly inappropriate here. The jury might well have relied upon the presumption, rather than the evidence, to conclude that the petitioner was guilty of malice murder. As Justice Blackman indicated in Connecticut v. Johnson,

[t]he fact that the reviewing court may view the evidence of intent as overwhelming is then simply irrelevant.

460 U.S. at 86. The present case provides an excellent vehicle for deciding whether the plurality opinion in <u>Johnson</u> or the majority opinion of the Court of Appeals below states the proper constitutional rule.

 substance to the conclusion that the evidence of intent was far from overwhelming." <a href="Id">Id</a>. at 4500-01. Petitioner's jury, after approximately two hours of deliberation, also asked the trial court for further instructions on malice. The Court of Appeals made nothing of the fact. At the very least, this Court should accordingly grant the petition for certiorari, vacate the Court of Appeals' decision, and remand the case for reconsideration in light of <a href="Francis">Francis</a>.

V.

THE COURT SHOULD GRANT CERTIORARI ON THE ISSUES COMMON TO THIS CASE, GRIGSBY V. MABRY, AND KEETEN V. GARRISON

In Witherspoon v. Illinois, 391 U.S. 510, 520 n.18 (1968), this Court reserved the question whether the exclusion for cause of prospective jurors who could fairly decide a capital defendant's quilt or innocence, solely because of their inability to consider the death penalty, might create a "jury ... less than neutral with respect to guilt." Since that time, after thorough evidentiary hearings, two federal district courts have found that such juries are in fact "quilt-prone" and unrepresentative in a Sixth Amendment sense, and that the exclusion of such jurors at the quilt phase of a bifurcated capital trial deprives a defendant of the constitutional rights to a fair jury and one drawn from a representative cross-section of the community. Grigsby v. Mabry, 569 F. Supp. 1273 (E.D. Ark. 1983); Keeten v. Gatrison, 578 F. Supp. 1164 (W.D.N.C. 1984). The Grigsby case was affirmed by the Eighth Circuit en banc. Grigsby v. Mabry, 758 F.2d 226 (8th Cir. 1985) (en banc). The Keeten case was reversed, by a panel of the Fourth Circuit, Keeten v. Garrison, 742 F.2d 129 (4th Cir. 1984), and a certiorari petition to review the latter decision has been filed, O.T. 1984, No. 84-5187.

In its decision below, the Eleventh Circuit aligned itself with the Fourth Circuit's holding in Reeten and opposed itself to the Eighth Circuit's holding in Grigsby. This Court should grant certiorari to settle the conflict among the circuits.

# CONCLUSION

The petition for certiorari should be granted.

Dated: May 28, 1985.

Respectfully submitted,

JULIUS L. CHAMBERS JAMES M. NABRIT, III . JOHN CHARLES BOGER DEVAL L. PATRICK 99 Hudson Street New York, New York 10013 (212) 219-1900

ROBERT H. STROUP 1515 Healey Building Atlanta, Georgia 30303

TIMOTHY K. PORD 600 Pioneer Building Seattle, Washington 98104

ANTHONY G. AMSTERDAM New York University School of Law 40 Washington Square South New York, New York 10012

\* ATTORNEY OF RECORD

ATTORNEYS FOR PETITIONER

# CERTIFICATE OF SERVICE

I hereby certify that I am attorney of record for petitioner Warren McCleskey, and that I served the annexed Petitioner for Certiorari and Motion for Leave to Proceed In Forma Pauperis on respondent by placing copies in the United States mail, first class mail, postage prepaid, addressed as follows:

Mary Beth Westmoreland, Esq. Assistant Attorney General 132 State Judicial Building 40 Capitol Square, S.W. Atlanta, Georgia 30334

All parties require to be served have been served.

Done this 28 day of May, 1985.

- 59 -

84-6811

CHARLES AND ALLES SON OF

to be seen or their a 66 + cab 2 48 A ...

\* 4. . . . . . .

. . . . . .

the state of the last

444

say . ...

**"一个一个一个一个** -44 my . .

Miner Strate

Daniel .

1 18 7 17 200 1

1 - 18 - 23 

- . 15 . - 4

W 4 197 1911

Bertham.

FILED MAY 28 1985 AEDIANDER L STEV

CLERK

The state of the s

" water townly a IN TEB -

SUPPREME COURT OF THE UNITED STATES

October Term, 1984

WARREN McCLESEEY,

the second state of the second second

the state of the second of the

Petitioner,

- Carlotte of the second

-against-

BALPR M. KEMP, Superintendent, Georgia Diagnostic & Classification Center,

Respondent,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS POR THE BLEVENTH CIRCUIT

# PETITICNER'S APPENDICES

the entire the section in a

Market Committee of the JULIUS L. CHAMBERS JAMES M. NABRIT, III . JOHN CHARLES BOGER DEVAL L. PATRICE 99 Budson Street New York, New York 10013 (212) 219-1900

> ROBERT E. STROUP 1515 Healey Building Atlanta, Georgia 30303

> > TIMOTHY K. PORD 600 Pioneer Building Seattle, Washington 98104

ANTHONY G. AMSTERDAM New York University School of Law 40 Washington Square South New York, New York 10012 the state of the s

. COUNSEL OF RECORD

ATTORNEYS POR PETITIONER

# TABLE OF CONTENTS

- Appendix A Opinion of the United States Court of Appeal for the Eleventh Circuit in McCleskey v. Kemp, 753-F.2d 877 (11th Cir. 1985) (en banc)
- Appendix B Opinion of the United States District Court for the Northern District of Georgia, Atlanta Division, in McCleskey v. Zant, 580 F.Supp. 338 (N.D. Ga. 1984)
- Appendix C Order of the Court of Appeals, dated March 26, 1985 denying rehearing
- Appendix D Statutory Provisions Involved
- Appendix E Statements of Facts from Petitioner's
  Post-Hearing Memorandum of Law in
  Support of His Claims of Arbitrariness and Racial Discrimination, submitted to the District Court in
  McCleskey v. Zant, No. C81-2434A;
  and Statement of Facts from En Banc
  Brief for Petitioner McCleskey, submitted to the Court of Appeals in
  McCleskey v. Kemp, No. 84-8176

# Appendix A -1. 1. 1. 2. 1. 1.

( Fre 20 . )

11.5 - 63049

. A. 1. 1. 15

3. 354 6

45 34.24 

4. 4 

100.000 25 ... 6 -2

17 May 1

F. W. P. S.

F. A. S.

No. of the second

できないとというなから、これをできたいということのできませんと

Approximately the second secon

and the same

contemporary and a service of

A CONTRACTOR OF THE PARTY OF TH · Maria Caller Com - - -

Karman Land

self-ter

A STATE OF THE STA

1. 1 th.

Opinion of the United States Court of Appeals for the Eleventh Circuit in McCleskey V. 753 7.2d 879 (11th Cir. 1985) (en banc)

The same of the sa

And the second s

Industrial to the second of th

consututed ineffective assistance of counsel.

Id. at 1240

The Court accordingly finds that Petitioner's claim of restriction of non-statutory mitigating factors has been previously raised and adjudicated on the merits. Reconsideration of this claim may be barred pursuant to Rule 9(b) and the first branch of the Sanders doctrine unless the ends of justice would thereby be defeated.

The Court finds that Petitioner had a full and fair opportunity to present this argument at the time of litigating the second habeas petition. The facts upon which this claim is based were known to Petitioner at the time the second petition was filed because Petitioner reified upon the transcript of the first sentencing hearing in setting firth the ineffective assistance of counsel claim. No justification exists for failing to make this argument in the prior habeas petitions.

In addition, the Court finds that the law of the case docurine preciudes relitigation of this claim because, as previously noted, the Eleventh Circuit held in Raulerson v Waimsimphi. 732 F.2d 803, 810 (11th Cir. 1984) that challenges to the first sentencing proceeding are irrelevant in a petition for relief from a sentence imposed at the second sentencing proceeding. Again, this decision was not clearly erroneous and would not work a manifest injustice in this case.

In conclusion, the Court notes that with the exception of one witness' testimony, the gist of the evidence introduced at the hearing on abuse of the writ sought to establish excusable neglect or the absence of deliberate bypass in failing to raise the present claims in the prior petition. However, this Court has concluded that all of Petitioner's claims were indeed raised in the previous habeas petition. Thus, the first branch, rather than the second branch of the Sanders docume applies.

Accordingly it is ORDERED and ADJUDGED

- That the Petition for Wmt of Habeas Corpus, filed herein on January 23, 1985, is hereby DENIED;
- That the Motion for a Stay of Execution, filed herein on January 23, 1985, is hereby DENIED;
- 3. In light of the Court's ralings, the Petitioner's Emergency Motion for Immediate Hearing filed on January 26, 1985. Motion and Authorities for Evidentiary Hearing filed on January 23, 1985, Motion for Leave to Take Depositions of Out of State Witnesses filed on January 23, 1985; and Supplemental Motion filed on January 21, 1985, are hereby rendered MOCT.



Warren McCLESKEY Petitioner-Appellee. Cross-Appellant.

Raiph KEMP, Warden. Respondent-Appellant. Cross-Appellee.

No. 84-8176.

United States Court of Appeals. Eleventh Circuit. Jan. 29, 1985.

After defendant's convictions and sentences for murder on two counts of armed toppers were affirmed by the Georgia Supreme Court, 245 Ga. 108, 283 S.E.2d 146 ne petitioned for habeas corpus relief. The United States District Court for the Northern District of Georgia. J. Owen Forrester, J. 580 F. Supp. 338, granted habeas corpus relief, but concluded that defendant failed to support his claim that Georgia death-sentencing process was unconstitutional. Both defendant and state appealed. The Court of Appeals. Roney, Circuit Judge, being that ILI states a nondisclosure of defendant that it is states a nondisclosure of defendant that it is states a nondisclosure of defendant in the court of defendant in the court of defendant and state appealed.

tective's statement to prisoner who testified that defendant made a jailhouse confession did not violate defendant's due process rights; (2) proof of a disparate impact alone is insufficient to invalidate a capital sentencing system: (3) fact that on average a white victim crime is six percent more likely to result in death sentence than a comparable black victim crime was not sufficient to overcome presumption that Georgia death-sentencing process is operating in a constitutional manner; (4) statistical study was insufficient to show that defendant's sentence was determined by race of his victim; (5) defendant failed to establish ineffective assistance of counsel; and (6) in course of asserting his alibi defense, defendant effectively conceded issue of intent, thus rendering erroneous burdenshifting instruction on intent harmless beyond a reasonable doubt.

Reversed and rendered.

Tioflat and Vance, Prouit Judges concurred with opinions

Kravitch, Circuit Judge, usued concurring statement.

R. Lanier Anderson, III. Co. and Sudge, concurred with opinion in which Krawitch. Circuit Judge, joined as to the constitutional application of the Georgia Death Statute.

Godbold. Chief Judge, dissented in part, and concurred in part, with opinion in which Johnson. Hatchett, and Clark. Circuit Judges, joined as to the dissent in the Gighto issue.

Johnson, Circuit Judge, dissented in part and concurred in part with opinion in which Hatchett and Clark, Circuit Judges, toined

Hatchett and Clark, Circuit Judges, dissented in part and concurred in , if with opinions.

# 1. Constitutional Law @268/9, 10

State violates due pricess when it on takes a conviction through use of false eldence or on basis of a witness testimony when that witness has failed to disclose a promise of favorable treatment from

prosecution. U.S.C.A. Const.Amends. 5

# 2. Criminal Law (\$700(4)

Purpose of rule requiring disclosure of a promise of favorable treatment as a reward for his testimony is to ensure that a jury knows the facts that motivate witness in giving testimony.

### 3. Constitutional Law = 268(10)

State's nondisclosure of statement of detective to witness that detective would. "speak a word" for him did not infringe defendant's due process rights, since statement offered such a marginal benefit that it was doubtful it would motivate a reluctant witness, or that disclosure of statement would have had any effect on his credibility. U.S.C.A. Const.Amends 5, 14.

### 4. Criminal Las (\$1171.1(1))

Even if state's failure to disclose detective's cryptic statement to witness that he would "speak a word" for him or to disclose witness' inconsistent version of escape constituted a violation of defendant's due process rights, error was harmiess, since it was unlikely that undisclosed information would have affected jury's assessment of witness' credibility. U.S.C.A. Const.Amends 5, 14

### 5. Criminal Law =519

Under Georgia law an accomplice a testimony alone in felony cases is insufficient to establish a fact. O.C.G.A. § 24-4-8.

### 6. Criminal Law =511.14

Corroboration of accomplice's testimony need not extend to every material detail.

# : Criminal Law =553 1

In evidentiary terms, statistical studies based on correlation are discumstantial evidence, they are not direct evidence.

### 5 Criminal Law = 1205 114

Limited circumstance under which statistical evidence awhe can establish intentional racial discrimination in the imposition of capital sentence is where the statistical evidence of racially disproportionate most is so strong as to permit no inference other racially discriminatory intent or purpose.

### 9. Criminal Law =388

Statistical evidence may be presented in the trial court through direct testimony and cross-examination of statistical information that bears on an issue

### 10. Criminal Law = 1213.8(8)

A successful Eighth Amendment challenge, based on race, to a capital sentencing system would require proof that the race factor is operating in the system in such a pervasive manner that it could fairly be said that system is irrational, arbitrary and capricious. U.S.C.A. Const.Amend. 8

# 11. Constitutional Law =270(1)

Where a capital sentencing statute is facially neutral, a due process claim based on race must be supported by proof that a state, through its prosecutors, jurors, and judges, has implicitly attached an aggravating label to race. U.S.C.A. Const. Amends 5, 14

# 12. Constitutional Law =251

Application of the due process clause is an uncertain enterprise which must discover what "fundamental fairness" consists of in a particular situation by first considering any relevant precedents and then by assessing the several interests that are at stake, due process also requires the assessment of the risk that the procedures being used will lead to erroneous decisions. US C.A Const. Amends 5, 14.

### 13. Constitutional Law =2:0(2)

With regard to a claim that a capitalsentencing process violates due process because of a race factor, claimant must present evidence which establishes that in the process race is a motivating factor in the decision. U.S.C.A. Const.Amends. 5. 14

# 14. Criminal Law \$986.2(1)

Where racial discrimination is claimed with regard to sentencing process, not on basis of procedural faults or flaws in the structure of the law, but on the basis of the decisions made within that process, then approximately 20 percent in midrange

than that the results are the product of a purpose, intent and motive are a natural component of the proof that discrimination actually occurred.

# 15. Constitutional Law =215

With regard to a constitutional claim of racial discrimination, a showing of disproportionate impact alone is not sufficient to prove requisite discriminatory intent unless no other reasonable inference can be

# 16. Criminal Law = 1208.1(4)

Proof of a disparate impact alone is insufficient to invalidate a capital sentencing system, unless that disparate impact is so great that it compels conclusion that the system is unprincipled, irrational, arbitrary and capricious such that purposeful disemmination, i.e., race is intentionally being used as a factor in sentencing, can be presumed to permeate the system.

# 17. Criminal Law \$1208.1(4)

With regard to claim of racial disparity in application of a state's death penalty, statistical studies may reflect a disparity so great as to inevitably lead to a conclusion that the disparity results from discriminatory intent or motivation.

# 18. Criminal Law (>1158(1)

Findings of fact are reviewed under the clearly erroneous standard.

# 19. Criminal Law = 1158(1)

Whether a disparate impact reflects an intent to discriminate is an ultimate fact which must be reviewed under the clearlyerroneous standard

# 20. Criminal Law (\$1208.1(4))

Fact that on average a white victim crime is six percent more likely to result in a death sentence than a comparable black victim crime was not sufficient to overcome presumption that Georgia capital sentencing system is operating in a constitutional manner

### 21. Criminal Law = 1205.1(4)

Assuming that statistical study was accurate in its conclusion that a white vic um increased akelihood of death penalty by

cases, such a disparity did not provide basis constitute ineffective assistance of counsel, for systemwide challenge to Georgia capital-sentencing process, since system as a whole is operating in a rational manner, and not in a manner that can fairly be labeled arbitrary or capricious.

# 22. Criminal Law =986.2(1)

Statistical study showing that, on average, race-of-the-victim factor was more likely to affect outcome in midrange cases than in those cases at high and low ends of the spectrum of aggravation was insufficient to show that defendant's sentence was determined by race of his victim or even that race of victim contributed to imposition of the penalty.

### 23. Criminal Law (\$1166.11(5))

Ineffective assistance of counsel warrants reversal of a conviction only when there is a reasonable probability that the attorney's errors altered the outcome of the proceeding

### 24. Criminal Law \$641.13(1)

A court may decide an ineffectiveness of counsel claim on ground of lack of prejudice without considering reasonableness of attorney's performance

### 25. Criminal Law =1166.11(5)

Defendant failed to demonstrate prejudice caused by counsel's failure to interview prisoner who testified that defendant gave a jailhouse confession, with regard to detective's statement to prisoner, since there was no reasonable probability that counsel's failure to discover such evidence affected the verdict.

### 26. Criminal Law == 1166.11(5)

Defendant failed to establish that he was prejudiced by counsel's failure to interview victims of robbery, in absence of contention that an in-person interview would have revealed something their statements did not: moreover, defendant had an opportunity to cross-examine several of the robbery victims at his preliminary hearing.

# 27. Criminal Las \$641.13(6), 1166.11(5)

where counsel relied primarily on alibi defense at trial, and it would have undermined his defense if he had called the vicums to testify as to which robber did the shooting: moreover, no prejudice could be shown by failing to subpoens the witness-

### 28. Criminal Law =641.13(6)

Attorney's failure to interview state's ballistics expert did not consutute ineffective assistance of counsel, since attorney could have reasonably prepared to cross-examine state's expert by reading expert's report in prosecutor's file, no in-person interview was necessary.

### 29. Criminal Law 641.13(6)

Where attorney talked with both defendant and his sister about potential character witnesses who would testify at sentencing phase, they suggested no possibilities, and sister refused to testify and advised attorney that their mother was too sick to travel to site of trial, attorney conducted reasonable investigation for character withesses

### 30. Criminal Law \$641.13(6)

With regard to ineffective assistance of counsel claim based on failure of counsel to object to state's introduction of three convictions resulting in life sentences. all of which were set aside on Fourth Amendment grounds, evidence did not result in any undue prejudice, because although convictions were overturned, charges were ? " dropped and defendant pleaded guilty 8: received senuences of 18 years, a reduction in sentence which was disclosed at that U.S.C.A. Const.Amend 4

### 31. Jury = 33/2.11. 108

Jurors who indicated that they would not, under any circumstances, consider imposing the death penalty were properly exciuded, and such exclusion did not violate defendant's South Amendment rights to an Counse's failure to subpoens victims imparts,' community-representative jury of roobery as defense witnesses did not USIA Const.Amend 6

### 32 Criminal Law @1172.2

An erroneous burden-shifting instruction may have been harmless if evidence of guilt was so overwhelming that error could not have contributed to jury's decision to convict.

### 33. Criminal Law ←1172.6

An erroneous burden-shifting instruction may be harmless where instruction shifts burden on an element that is not an issue at trial.

### 34. Criminal Law =308

A defendant in a criminal trial may rely entirely on presumption of innocence and state's burden of proving every element of the crime beyond a reasonable doubt.

### \*35. Criminal Law €1172.2

Erroneous burden-shifting instruction concerning intent was harmless beyond a reasonable doubt, considering that defendant in course of asserting his alibi defense effectively conceded issue of intent.

### 36. Criminal Law =1172.2

Where the state has presented overwhelming evidence of an intentional killing and where defendant raises a defense of nonparticipation in the crime rather than lack of mens rea, a Sandstrom violation on an intent instruction is harmless beyond a reasonable doubt.

Mary Beth Westmoreland, Asst. Atty-Gen., Atlanta, Ga., for respondent-appellant, cross-appellee.

Robert H. Stroup, Atlanta, Ga., John Charles Boger, Anthony G. Amsterdam, New York University-School of Law, New

\*All of the Judges of the Court concur in the judgment as to the death-oriented jury claim and the ineffective assistance of counsel claim. Judges Tjoflat. Vance and Anderson join in the opinion but each has written separately on the constitutional application of the Georgia death sentence.

Judge Kravitch has written separately to concur only in the harmless error pomon of the opinion on the Giglio issue but joins in the opinion on all other issues. York City, for petitioner-appellee, cross-appellant.

Appeals from the United States District Court for the Northern District of Georgia.

Before GODBOLD, Chief Judge, RONEY, TJOFLAT, JAMES C. HILL, FAY, VANCE, KRAVITCH, JOHNSON, ALBERT J. HENDERSON, HATCHETT, R. LANIER ANDERSON, III, and CLARK, Circuit Judges.

RONEY, Circuit Judge, with whom Judges TJOFLAT, JAMES C. HILL. FAY, VANCE, ALBERT J. HENDERSON and R. LANIER ANDERSON, III, join \*:

This case was taken en banc principally to consider the argument arising in numerous capital cases that statistical proof shows the Georgia capital sentencing law is being administered in an unconstitutionally discriminatory and arbitrary and capricious matter. After a lengthy evidentiary hearing which focused on a study by Professor David C. Baidus, the district court concluded for a variety of reasons that the statistical evidence was insufficient to support the claim of unconstitutionality in the death sentencing process in Georgia. We affirm the district court's judgment on this point.

The en banc court has considered all the other claims involved on this appeal. On the State's appeal, we reverse the district court's grant of habeas corpus relief on the claim that the prosecutor failed to disclose a promise of favorable treatment to a state witness in violation of Gigito v. United States, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972). We affirm the judgment denying relief on all other points raised by the defendant, that is: (1) that defendant received ineffective assistance of

Chief Judge Godbold dissents from the judgment of the Court on the Giglio issue but joins in the opinion on all other issues.

Judges Johnson. Harchett and Clark dissent from the judgment of the Court on the constitu-tional application of the Georgia death sentence and the Sandetrom and Giglio issues and each has written a separate dissenting opinion.

counsel; (2) that jury instructions contravened the due process clause in violation of Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979); and (3) that the exclusion of death-scrupled jurors violated the right to an impartial and unbiased jury drawn from a representative cross-section of the community.

Thus, concluding that the district court should have denied the petition for writ of habeas corpus, we affirm on all claims denied by the court, but reverse the grant of habeas corpus relief on the Giglio claims.

### FACTS

Warren McCleskey was arrested and charged with the murder of a police officer during an armed robbery of the Dixie Furniture Store. The store was robbed by a band of four men. Three entered through the back door and one through the front. While the men in the rear of the store searched for cash, the man who entered through the front door secured the showroom by forcing everyone there to lie face down on the floor. Responding to a silent alarm, a police officer entered the store by the front door. Two shots were fired. One shot struck the police officer in the head causing his death. The other glanced off a cigarette lighter in his chest pocket.

McCleskey was identified by two of the store personnel as the robber who came in the front door. Shortly after his arrest, McCleskey confessed to participating in the robbery but maintained that he was not the triggerman McCleskey confirmed the eyewitness' accounts that it was he who entered through the front door. One of his accomplices. Ben Wright, testified that McCleskey admitted to shooting the officer. A jail inmate housed near McCleskey testified that McCleskey made a "jail house confession" in which he claimed he was the triggerman. The police officer was killed by a buile: fired from a 38 caliber Ross: handgun. McCleskey had stolen a 38 callber Rossi in a previous holdup

# PRIOR PROCEEDINGS

The jury convicted McCleskey of murder and two counts of armed robbers. At the

penalty hearing, neither side called any witnesses. The State introduced documentary evidence of McCleskey's three prior convictions for armed robbery.

The jury sentenced McCleskey to death for the murder of the police officer and to consecutive life sentences for the two counts of armed robbery. These convictions and sentences were affirmed by the Georgia Supreme Court. McClesky v State. 245 Ga. 108, 253 S.E.2d 146, cert. denied. 449 U.S. 891, 101 S.Ct. 253, 66 L.Ed.2d 119 (1980). McCleskey then peutioned for habeas corpus relief in state court. This petition was denied after an evidentiary hearing. The Georgia Supreme Court denied McCleskey's application for a certificate of probable cause to appeal The United States Supreme Court denied a peution for a writ of ceruorari. McCleskey v Zant. 454 U.S. 1093, 102 S.Ct. 659 70 LEd.2d 631 (1981).

McCleskey then filed his petition for habeas corpus relief in federal district court asserting, among other things, the five constitutional challenges at issue on this appeal. After an evidentiary hearing and consideration of extensive memoranda filed by the parties, the district court entered the lengthy and detailed judgment from which these appeals are taken. McCleskey v. Zant. 380 F.Supp. 338 (N.D.Ga.1984).

This opinion addresses each issue asserted on appeal in the following order 11 the Giglio claim. (2) constitutionality of the application of Georgia's death penalty. (3) effective assistance of counsel. (4) death-qualification of jurors, and (5) the Sandstrom issue.

### GIGLIO CLAIM

[1] The district court granted habeas corpus relief to McCleskey because it determined that the state prosecutor failed to reveal that one of its witnesses had been promised favorable treatment as a reward for his testimony. The State violates due process when it obtains a conviction through the use of failse evidence or on the

basis of a witness's testimony when that The Irial Testimony witness has failed to disclose a promise of favorable treatment from the prosecution. Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763. 31 L.Ed.2d 104 (1972).

We hold that (1) there was no promise in this case, as contemplated by Giglio: and (2) in any event, had there been a Giglio violation, it would be harmless. Thus, we reverse the grant of habeas corpus relief on this ground.

Offie Gene Evans, a prisoner incarcerated with McCleskey, was called by the State on rebuttal to strengthen its proof that McCleskey was the triggerman at the holdup. Evans testified that McCleskey admitted to him in jail that he shot the policeman and that McCleskey said he had worn makeup to disguise his appearance during the robbery

The "Promise"

At McCleskey's state habeas corpus hearing. Evans gave the following account of certain conversations with state officials.

THE COURT Mr. Evans, let me ask you a question. At the time that you testified in Mr McCleskey's trial, had you been promised anything in exchange for your testimony

THE WITNESS. No. I wasn't. I wasn't promised nothing about—I wasn't promised nothing by the D.A. but the Detective told me that he would-he said he was going to do it himself. speak a word for me. That was what the Detective told me

by McCleskey's attorney's The Detective said he would speak a word for you"

A Yeah

A pepulation of McCleskey's prosecutor that was taken for the state habeas corpus proceeding reveals that the prosecutor contacted federal authorities after McClesker's trial to advise them of Evans' cooperation and that the escape charges were dropped

At the trial, the State brought out on direct examination that Evans was incarcerated on the charge of escape from a federal halfway house. Evans denied receiving any promises from the prosecutor and downplayed the seriousness of the escape charge.

Q: [by prosecutor]: Mr. Evans, have I promised you anything for testifying

today"

A: No. sir. you ain t.

Q: You do have an escape charge still

pending, is that correct."

- A: Yes, sir. I've got one, but really it ain't no escape, what the peoples out there tell me, because something went wrong out there so I just went home. I stayed at home and when I called the man and told him that I would be a little late coming in, he piaced me on escape charge and told me there wasn't no use of me coming back, and I just stayed on at home and he come and picked me up.
- Q Are you hoping that perhaps you won't be prosecuted for that escape'
- A: Yeah, I hope I don't, but I don'twhat they tell me, they ain't going to charge me with escape no way
- Q: Have you asked me to try to fix it so you wouldn't get charged with escape"
- A No. sir.
- Q Have I sold you I would try to fix it for you?
- A. No. sur

The State Habeas Compus Decision

The state court rejected McCleskey's Gigino claim on the following reasoning Mr Evans at the habeas hearing denied that he was promised anything for his testimony. He did state that he was told by Detective Dorsey that Dorsey would spean a word for him. The detective's er party communication recommendation alone is not sufficient to trigger the appileability of Gigito v. L'wited States, 405 L'S 150 [92 S Ct. 763 31 L.Ed.2d 104] (1972)

The prosecutor at petitioner's unal, Russel J. Parker, stated that he was unaware of any understandings between Evans and any Atlanta Police Department detectives regarding a favorable recommendation to be made on Evans federal escape charge. Mr. Parker admitted that there was opportunity for Atlanta detectives to put in a good word for Evans with federal authorities. However, he further stated that when any police officer has been killed and someone ends up testifying for the State. putting his life in danger, it is not surprising that charges, like those against Evans, will be dropped.

In the absence of any other evidence, the Court cannot conclude an agreement exused merely because of the subsequent disposition of criminal charges against a witness for the State.

Although it is reasonable to conclude that the state court found that there was no agreement between Evans and the prosecutor, no specific finding was made as to Evans' claim that a detective promised to "speak a word for him." The court merely held as a matter of law that assuming Evans was telling the truth, no Giglio violation had occurred.

### Was It a Promise?

The Supreme Court's rationale for imposmg this rule is that "[t]he jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence" Napue v. Illinois, 360 U.S. 264, 269, 79 S.Ct. 1173, 1177, 3 L.Ed.2d 1217 (1959) The Court has never provided definitive guidance on when the Government's dealings with a prospective witness so affect the witness credibility that they must be disclosed at trial. In Giglio, a prosecutor promised the defendant's alleged co-conspirator that no charges would be brought against him if he testified against the defendant. In Napue, a prosecutor promised a witness that in exchange for his testimony the prosecutor would recommend that the sentence the witness was presently serving be reduced.

[2, 3] In this case, the detective's promise to speak a word falls far short of the understandings reached in Giglio and No. pue. As stated by this Court, "[t]he thrust of Giglio and its progeny has been to ensure that the jury know the facts that might motivate a witness in giving testimo-Smith v. Kemp. 715 F 2d 1459, 1467. BV." (11th Cir.), cert denied - U.S - 104 S.Ct. 510, 78 LEJ 2d 699 (1983). The detective's statement offered such a marginal benefit, as indicated by Evans, that it is doubtful it would motivate a reluctant witness, or that disclorure of the statement would have had any effect on his credibility. The State's nondisclosure therefore failed to infringe McCleskey's due process

# Was Any Violation Harmless?

[4] In any event, there is no "reasonable likelihood" that the State's failure to disclose the detective's cryptic statement or Evans' different escape scenario affected the judgment of the jury See Giglio 408 U.S. at 154 90 S.Ct. at 766. Evans' credbility was exposed to substantial impeachment even without the detective's state ment and the inconsistent description of his escape. The prosecutor began his direct examination by having Evans recite a litany of past convictions. Evans admitted to convictions for forgery two burgianes, larceny, carrying a concealed weapon, and theft from the United States mail. On cross examination. McCleskey's attorney attempted to portray Evans as a "professional emminal". Evans also admitted that he was testifying to protect himself and one of McCleskey's codefendants. In light of this substantial impeachment evidence. we find it unlikely that the undisclosed information would have affected the jury s assessment of Evans' credibility See United States v. Anderson, 574 F 2d 1347. 1356 (Sth Cir 1975).

(5.6) McCleskey claims Evans' testimony was crucial because the only other testimony which indicated he pulled the trigger came from his codefendant. Ben Wright Ben Wright's testimony McCleskey arges.

would have been insufficient under Georgia law to convict him without the corroboration provided by Evans. In Georgia, an accomplice's testimony alone in felony cases is insufficient to establish a fact. O.C.G.A. 1 24-4-8. Wright's testimony, however, was corroborated by McCleskey's own confession in which McCleskey admitted participation in the robbery. See Arnold v. State. 236 Ga. 534, 224 S.E. 2d 388 (1976). Corroboration need not extend to every material detail. Bialock v. State. 250 Ga. 441, 298 S.E. 2d 477, 479-80 (1983). Cofer v. State. 166 Ga.App. 436, 304 S.E. 2d 537, 539 (1983).

The district court thought Evans' testimony critical because of the unformation he supplied about makeup and McCleskey's intent in shooting the police officer. Although we agree that his testimony added weight to the prosecution's case, we do not find that it could "in any reasonable likelihood have affected the judgment of the jury " Giglie, 405 U.S. at 154, 92 S.Ct. at 766 (quoting Napur v. Illinois, 360 U.S. at 271. 79 S.Ct at 1178). Evans, who was called only in rebuttal, testified that McCleskey had sold him that he knew he had to shoot his way out, and that even if there had been twelve policemen he would have done the same thing. This statement, the prosecutor argued, showed malice. In his closing argument, however, the prosecutor presented to the jury three reasons supporting a conviction for malice murder. First, he argued that the physical evidence showed malicious intent because it indicated that McCleskey shot the police officer once in the head and a second time in the chest as he lay dying on the floor Second, the prosecutor asserted that McCleskey had a choice, either to surrender or to kill the officer. That he chose to will indicated malice. Third, the prosecutor contended that McCleskey's statement to Evans that he still would have shot his way out if there had been twelve police officers showed malice. This statement by McCleskey was not developed at length during Evans' testimony and was mentioned only in passing by the prosecutor is closing argument

Evans' testimony that McCleskey had made up his face corroborated the identification testimony of one of the eyewitnesses. Nevertheless, this evidence was not crucial to the State's case. That McCleskey was wearing makeup helps to establish he was the robber who entered the furniture store through the front door. This fact had already been directly testified to by McCleskey's accomplice and two eyewitnesses as well as corroborated by McCleskey's own confession. That Evans' testimony buttresses one of the eyewitnesses' identifications is relatively unimportant.

Thus, although Evans' testimony might well be regarded as important in certain respects, the corroboration of that testimony was such that the revelation of the Giglio promise would not reasonably affect the jury's assessment of his credibility and therefore would have had no effect on the jury's decision. The district court's grant of habeas corpus relief on this issue must be reversed.

# CONSTITUTIONAL APPLICATION OF GEORGIA'S DEATH PENALTY

In challenging the constitutionality of the application of Georgia's capital statute. McCleskey alleged two related grounds for relief. (1) that the "death penalty is administered arbitrarily capitality, and whimsically in the State of Georgia." and (2) it "is imposed pursuant to a pattern and practice to discriminate on the grounds of race." both in violation of the Eighth and Fourteenth Amendments of the Constitution.

The district court granted petitioner's motion for an evidentiary hearing on his claim of system-wide racial discrimination under the Equal Protection Clause of the Fourteenth Amendment. The court noted that "it appears that petitioner's Eighth Amendment argument has been rejected by this Circuit in Spinkellink v. Wainumght, 578 F.2d 582, 512-14 (5th Cir. 1978) [but] petitioner's Fourteenth Amendment claim may be appropriate for consideration in the context of statistical

evidence which the petitioner proposes to present." Order of October 8, 1982, at 4.

An evidentiary hearing was held in August, 1983. Petitioner's case in chief was presented through the testimony of two expert witnesses, Professor David C. Baldus and Dr. George Woodworth, as well as two principal lay witnesses, Edward Gates and L.G. Warr, an official employed by Georgia Board of Pardons and Paroles. The state offered the testimony of two expert witnesses, Dr. Joseph Katz and Dr. Roger Burford. In rebuttal, petitioner recalled Professor Baldus and Dr. Woodworth, and presented further expert testimony from Dr. Richard Berk.

In a comprehensive opinion, reported at \$80 F.Supp. 338, the district court concluded that petitioner failed to make out a prima facie case of discrimination in sentencing based on either the race of victims or the race of defendants. The Court discounted the disparities shown by the Baidus study on the ground that the research (1) showed substantial flaws in the data base, as shown in tests revealing coding errors and mismatches between items on the Procedural Reform Study (PRS) and Comprehensive Sentencing Study (CSS) questionnaires, (2) lacked accuracy and showed flaws in the models, primarily because the models do not measure decisions based on knowledge available to decisionmaker and only predicts outcomes in 50 percent of the cases: and (3) demonstrated multi-collinearity among model variables, showing interrelationship among the variables and consequently distorting relationsnips, making interpretation difficult.

The district court further held that even if a prima facie case had been established, the state had successfully rebutted the showing because: (1) the results were not the product of good statistical methodology. (2) other explana, one for the study results could be demonstrated, such as, white victims were acting as proxies for aggravated cases and that black-victim cases, and (3) black-victim cases, being left cases, and (3) black-victim cases being left behind at the life sentence and voluntary

manslaughter stages, are less aggravated and more mitigated than the white-victim cases disposed of in similar fashion.

The district court concluded that petitioner failed to carry his ultimate burden of persuasion, because there is no consistent statistically significant evidence that the death penalty is being imposed on the basis of the race of defendant. In particular there was no statistically significant evidence produced to show that prosecutors are seeking the death penalty or juries are imposing the death penalty because the defendant is black or the victim is white Petitioner conceded that the study is incapable of demonstrating that he was singled out for the death penalty because of the race of either himself or his victim, and, therefore, petitioner failed to demonstrate that racial considerations caused him to receive the death penalty.

We adopt the following approach in addressing the argument that the district court erred in refusing to hold that the Georgia statute is unconstitutionally acplied in light of the statistical evidence First, we briefly describe the statistical Baldus study that was done in this case Second, we discuss the evidentiary value such studies have in establishing the ultimate facts that control a constitutional decision. Third we discuss the constitutional law in terms of what must be proved in order for peutioner to prevail on an argument that a state capital punishment law is unconstitutionally applied because of race discrimination. Fourth, we discuss whether a generalized statistical study such as this could ever be sufficient to prove the allegations of ultimate fact necessary to sustain a successful constitutional attack on a defendant's sentence Fifth, we discuss whether this study is valid to prove what it purports to prove. Suith, we deeide that this particular study, assuming its validity and that it proves what it claims to prove, is insufficient to either require or support a decision for petitioner

cases, and (3) black-victim cases, being left. In summary, we affirm the district court cases, and (3) black-victim cases being left on the ground that, assuming the validity behind at the life sentence and voluntary of the research, it would not support a

decision that the Georgia law was being in white victim cases in all circumstances unconstitutionally applied, much less would it compel such a finding, the level which petitioner would have to reach in order to prevail on this appeal.

The Baldus Study

The Baldus study analyzed the imposition of sentence in homicide cases to determine the level of disparities attributable to race in the rate of the imposition of the death sentence. In the first study, Procedural Reform Study (PRS), the results revealed no race-of-defendant effects whatsoever, and the results were unclear at that stage as to race-of-victim effects.

The second study, the Charging and Sentencing Study (CSS), consisted of a random stratified sample of all persons indicted for murder from 1973 through 1979. The study examined the cases from indictment through sentencing. The purpose of the study was to estimate racial effects that were the product of the combined effects of all decisions from the point of indictment to the point of the final death-sentencing decision, and to include strength of the evidence in the cases.

The study attempted to control for all of the factors which play into a capital crime system, such as aggravating circumstances, mitigating circumstances, strength of evidence, time period of imposition of sentence, geographical areas (urban/rural), and race of defendant and victim. The data collection for these studies was exceedingly complex, involving cumbersome data collection instruments, extensive field work by multiple data collectors and sophisticated computer coding, entry and data cleaning processes.

Baidus and Woodworth completed a multitude of statistical tests on the data consisting of regression analysis, indexing factor analysis, cross tabulation, and triangulation. The results showed a 67 racial effect systemwide for white victim, black defendant cases with an increase to 20° in or a black defendant in all cases

The object of the Baldus study in Fulton County, where McCleskey was convicted, was to determine whether the sentencing pattern disparities that were observed statewide with respect to race of the victim and race of defendant were pertinent to Fulton County, and whether the evidence concerning Fulton County shed any light on Warren McCleskey's death sentence as an aberrant death sentence, or whether racial considerations may have played a role in the disposition of his case

Because there were only ten cases involving police officer victims in Fulton County, statistical analysis could not be utilized effectively. Baldus conceded that it was difficult to draw any inference concerning the overall race effect in these cases because there had only been one death sentence. He concluded that based on the data there was only a possibility that a racial factor existed in McCleskey's

### Social Science Research Evidence

To some extent a broad issue before this Court concerns the role that social science is to have in judicial decisionmaking Social science is a broad-based field consisting of many specialized discipline areas. such as psychology, anthropology, economics, political science, history and sociology. Cf. Sperlich. Social Science Evidence and the Courts: Reaching Beyond the Adinsory Process, 63 Judicature 280, 283 n. 14 (1980). Research consisting of parametric and nonparametric measures is conducted under both laboratory controlled situations and uncontrolled conditions, such as real life observational situations, throughout the disciplines. The broad objectives for social science research are to better understand mankind and its institutions in order to more effectively plan, predict, modify and enhance society's and the individual's circumstances. Social science as a nonezact science is always mindful that its rethe mid-range of cases. There was no sug-search is dealing with highly complex behagestion that a uniform, institutional bias vioral patterns and institutions that exist in existed that adversely affected defendants a highly technical society. At best, this

research "models" and "reflects" society and provides society with trends and information for broad-based generalizations. The researcher's intent is to use the conclusions from research to predict, plan, describe, explain, understand or modify. To utilize conclusions from such research to explain the specific intent of a specific behavioral situation goes beyond the legitimate uses for such research. Even when this research is at a high level of exactness. in design and results, social scientists readily admit their steadfast hesitancies to conclude such results can explain specific behavioral actions in a certain situation.

The judiciary is aware of the potential limitations inherent in such research: (1) the imprecise nature of the discipline; (2) the potential inaccuracies in presented data: (3) the potential bias of the researcher: (4) the inherent problems with the methodology: (5) the specialized training needed to assess and utilize the data competently, and (6) the debatability of the appropriateness for cours to use empirical evidence in decisionmaking. Cf. Henry, Introduction: A Journey into the Future-The Role of Empirical Eindence in Developing Labor Law, 1981 U.Ill.L.Rev. 1, 4: Sperlich, 60 Judicature at 283 n. 14.

Historically, beginning with "Louis Brandeis' use o, empirical evidence before the Supreme Court ... persuasive social science evidence has been presented to the courts." Forst, Rhodes & Weilford, Sentenning and Social Science: Research for the Formulation of Federal Guidelines. Hofstra L.Rev. 355 (1979). See Muller v. Oregon, 208 U.S. 412 28 S.CL 324, 52 LEd. 551 (1908); Brown r. Board of Education 347 U.S. 483, 74 S.Ct. 666, 98 L.Ed. 873 (1954). The Branders brief presented social facts as corroborative in the judicial decisionmaking process. O'Brien, Of Judicial Myths. Motivations and Justifications: A Postsempt on Social Science and the Law. 64 Judicature 285, 288 (1981). The Brandeis brief "is a well-known technique for asking the court to take judicial notice of social facts " Speriich, 63 Judicature at 280, 285 n. 31. "It does not solve the problem of how to bring valid scientific 421 (5th Cir 1980) cert. denied. 459 U.S.

materials to the attention of the court. Brandeis did not argue that the data were valid, only that they existed ... The main contribution ... was to make extra-legal data readily available to the court."

This Court has taken a position that social science research does play a role in judicial decisionmaking in certain situations, even in light of the limitations of such research. Statistics have been used primarily in cases addressing discrimination.

[7] Statistical analysis is useful only to show facts. In evidentiary terms, statistical studies based on correlation are circumstantial evidence. They are not direct evidence. Teamsters v. United States. 431 U.S. 324, 340, 97 S.Ct. 1843, 1856, 52 L.Ed.2d 396 (1977). Statistical studies do not purport to state what the law is in a given situation. The law is applied to the facts as revealed by the research.

In this case the realities examined, based on a certain set of facts reduced to data. were the descriptive characteristics and numbers of persons being sentenced to death in Georgia. Such studies reveal, as circumstantial evidence through their study analyses and results, possible, or probable, relationships that may exist in the realities

[8] The usefulness of statistics obviously depends upon what is attempted to be proved by them. If disparate impact is sought to be proved, statistics are more useful than if the causes of that impact must be proved. Where intent and motivation must be proved, the statistics have even less utility. This Court has said in discrimination cases, however, "that while statistics alone usually cannot establish intentional discrimination, under certain limited circumstances they might." Spencer n. Zant. 715 F.2d 1582, 1581 (11th Cir. 1983), on pet for rehig and for rehig en bane. 729 F.2d 1293 (11th Cir 1994) See also Eastland r Tennesser Valley Authomay, 704 F.2d 613, 618 (11th Cir 1983); Johnson t. L'nele Ben's. Inc. 525 F 20 419

967, 103 S.CL 293, 74 L.Ed.2d 277 (1982). These limited circumstances are where the statistical evidence of racially disproporponate impact is so strong as to permit no inference other than that the results are the product of a racially discriminatory intent or purpose See Smith v. Balkcom. 671 F.2d 858 (5th Cir. Unit B), cert. denied. 459 U.S. 882, 103 S.CL 181, 74 L.Ed.2d 148 (1982)

[9] Statistical evidence has been received in two ways. The United States Supreme Court has simply recognized the existence of statistical studies and social science research in making certain decisions, without such studies being subject to the rigors of an evidentiary hearing. Muller t. Oregon. 208 U.S. 412, 28 S.CL 324, 52 LEd. 551 (1908): Fowler v. North Carolina. 428 U.S. 904, 96 S.Ct 3212, 49 L.Ed.2d 1212 (1976): Woodson v. North Carolina. 428 U.S. 280, 96 S.CL 2978, 49 L.Ed.2d 944 (1976); Jurek v. Tezas, 428 U.S. 262, 96 S.Ct. 2950; 49 L.Ed.2d 929 (1976); Proffitt v. Florada. 425 U.S. 242, 96 S.Ct. 2960, 49 Ed.2d 913 (1976); Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). The "Supreme Court, for example, encountered severe criticism and opposition to its rulings on desegregation of public schools, the exclusionary rule, and the retroactivity of its decisions, precisely because the court relied on empirical generalization." O'Brien. The Seduction of the Judiciary Social Science and the Courts. 64 Judicature 8, 19 (1980). In each of these situations the Court "focused" beyond the specifies of the case before it to the "institutions" represented and through a specific ruling effected changes in the institutions. On the other hand, statistical evidence may be presented in the trial court through direct testimony and cross-examination on statistical information that bears on an issue. Such evidence is examined carefully and subjected to the tests of relevancy. authenticity, probativeness and credibility Cf. Henry, 1981 U.III.L.Rev. at 9.

One difficulty with statistical evidence is that it may raise more questions than it answers. This Court reached that conclu- cepts social science research for what the

sion in Wilkins S. University of Houston. 654 F.2d 388 (5th Cir. Unit A 1981). In Wilkins this Court held that "[m]ultiple regression analysis is a relatively sophisticated means of determining the effects that any number of different factors have on a particular variable." Id at 402-03. This Court noted that the methodology "is subject to misuse and thus must be employed with great care." Id. at 403. Procedurally, when multiple regression is used "it will be the subject of expert testimony and knowledgeable cross-examination from both sides. In this manner, the validity of the model and the significance of its results will be fully developed at trial, allowing the trial judge to make an informed decision as to the probative value of the analysis." Id. Having done this, the Wilkins Court, in an employment discrimination case, held "the statistical evidence associated with the multiple regression analysis is inconclusive. raising more questions than it answers."

Even if the statistical evidence is strong there is generally a need for additional evidence. In Wade v. Musiamppi Cooperative Extension Serv., 528 F.2d 508 (5th Cir. 1976), the results drawn from the multivariate regression analysis were supported by additional evidence. Id at 31". Wade the statistics did not "stand alone" as the sole proof of discrimination.

Much has been written about the relationship of law and social science. "If social science cannot produce the required answers, and it probably cannot, its use is likely to continue to lead to a disjointed incrementalism" Daniels, Social Science And Drath Penalty Cases, I Law & Polly Q 336, 367 (1979). "Social science can probably make its greatest contribution to legal theory by investigating the causal forces behind judicial legislative and administrative decisionmaking and by probing the general effects of such decisions " gel. Law And The Somal Sciences What Can Some! Science Contribute? 356 A.B. AJ 356, 357-58 (1965).

With these observations, this Court ac-

social scientist should claim for it. As in all circumstantial evidence cases, the inferences to be drawn from the statistics are for the factfinder, but the statistics are accepted to show the circumstances.

Racial Discrimination, the Death Penalty, and the Constitution

McCleskey contends his death sentence is unconstitutional because Georgia's death penalty is discriminatorily applied on the basis of the race of the defendant and the victim. Several different constitutional bases for this claim have been asserted McCleskey relies on the arbitrary, capricious and irrational components of the prohibition of cruel and unusual punishment in the Eighth Amendment and the equal protection clause of the Fourteenth Amendment. The district court thought that with, respect to race-of-the-victim discrimination the petitioner more properly stated a claim upder the due process clause of the Fourteenth Amendment

Claims of this kind are seldom asserted with a degree of particularity, and they generally assert several constitutional precepts. On analysis, however, there seems to be little difference in the proof that might be required to prevail under any of the three theories.

In Fu-man v. Georgia, 408 U.S. 238, 92 S.CL 2726, 33 L.Ed.2d 346 (1972), the Supreme Court struck down the Georgia death penalty system on Eighth Amendment grounds, with several of the concurring justices holding that the system operated in an arbitrary and capricious manner because there was no rational way to distinguish the few cases in which death was imposed from the many in which it was not. ld at 313. 92 S.Ct. at 2764 (White. J. concurring): id at 309-10, 92 S.Ct. at 2.62-63 (Stewart, J. concurring). Although race discrimination in the imposition of the death penalty was not the basis of the decision, it was one of several concerns addressed in both the concurring and dissenting opinions. Ser id. at 249-52, 92 S.Ct. at Z.31-33 (Douglas, J concurring); id at 309-10, 92 5 Ct at 2762-63 (Stewart, 2. concurrings, and at 264-65, 92 S.Ct. at (1979), the Court rejected Eighth and Four

Z.90-91 (Marshall, J., concurring), 1d. at 389-90 n. 12, 92 S Ct. at 2503-04 n. . . (Burger, CJ. dissenting): id at 449, 92 S.Ct. at 2833 (Powell, J., dissenting)

Four years later, the Supreme Court approved the redrawn Georgia statute pursuant to which McCleskey was tried and sentenced. Gregg v. Georgia. 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). At the same time the Court approved statutes from Florida and Texas which, like Georgia, followed a guided discretion approach. but invalidated the mandatory sentencing procedure of North Carolina and Louisiana Proffitt v. Florida, 428 U.S. 242, 96 S.C. 2960, 49 L.Ed.2d 913 (1976): Jurek v. Texas. 429 U.S. 262. 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976); Woodson v North Carolina. 425 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976): Roberts v. Louisiana. 428 U.S. 325. 96 S.Ct 3001, 49 L.Ed.2d 974 (1976)

Since Greag, we have consistently held that to state a claim of racial discrimination in the application of a constitutional capital statute, intent and motive must be alleged. Sullivan v Wainumght, 721 F 2d 316, 317 (11th Cir 1983) (statistical impact studies insufficient to show state system "intentionally discriminated against petitioner"), petition for stay of execution denied -U.S. - 104 S.Ct. 450, 78 L.Ed.26 210 (1983); Adams v. Wainumght, 709 F.2d 1443. 1449 (11th Cir 1983) (requiring "a showing of an intent to discriminate or "evidence of disparate impact ... so strong that the only permissible inference is one of intentional discrimination"), cert. denord - U.S. - 104 S.CL 745, 79 LEd 2d 203 (1984); Smith v. Balkcom. 571 F 2d 858, 959 (5th Cir Unn B) (requiring "circumstantial or statistical evidence of racially disproportionate impact strong that the results permit no other inference but that they are the product of a racially discriminatory intent or purpose"). cerz denied, 459 U.S \$82, 102 S Ct. 191, 74 L.Ed.2d 148 (1982)

Initially in Spinkethal a Weinemen 579 F 25 580 Sth Cir 1978, cert. demind. 440 US 976 90 S Ct 1546 50 L Ed 26 Ten

death penalty was being applied in a discriminatory fashion on the basis of the victim's race. The Spinkellink Court read Gregg and its companion cases "as holding that if a state follows a properly drawn statute in imposing the death penalty, then the arbitrariness and capriciousness-and therefore the racial discrimination condemned in Furman-have been conclusive ly removed." Id. at 613-14. Spinkellink can not be read to foreclose automatically all Eighth Amendment challenges to capital sentencing conducted under a facially constitutional statute. In Godfrey v. Georgia. 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980), the Supreme Court sustained an Eighth Amendment challenge to a Georgia death sentence because the Georgia court's construction of a portion of that facially valid statute left no principled way to distinguish the cases where the death penalty was imposed from those in which it was not. See Proffitt v. Wainumght, 685 F.25 1227, 1261 n. 52 (11th Cir 1982). Nevertheless, neither Godfrey nor Proffitt undermines this Court's prior and subsequent pronouncements in Spinkellink. Smith. Adams, and Sullivan regarding the amount of disparate impact that must be shown under either an Eighth Amendment or equal protection analysis.

As the district court here pointed out. such a standard indicates an analytical nexus between Eighth Amendment claims and a Fourteenth Amendment equal protection ciaim. McCleskey v. Zant. 580 F.Supp. 338, 347 (N.D Ga 1984). Where an Eighth Amendment claim centers around generalized showings of disparate racial impact in capital sentencing such a connection is inscapable. Although conceivably the level or amount of disparate racial impact that would render a state's capital sentencing system arbitrary and capricious under the Eighth Amendment might differ slightly from the level or amount of disparate racial impact that would compel an inference of discriminatory intent under the equal protection clause of the Fourteenth Amendment, we do not need to decide whether there could be a difference in magnitude

teenth Amendment claims that the Florida that would lead to opposite conclusions on death penalty was being applied in a discriminatory fashion on the basis of the which theory a claimant asserts.

[10] A successful Eighth Amendment challenge would require proof that the race factor was operating in the system in such a pervasive manner that it could fairly be said that the system was irrational, arbitrary and capricious. For the same reasons that the Baldus study would be insufficient to demonstrate discriminatory intent or unconstitutional discrimination in the Fourteenth Amendment context, it would be insufficient to show irrationality, arbitrariness and capriciousness under any kind of Eighth Amendment analysis.

The district court stated that were it writing on a clean slate, it would characterize McCleskey's claim as a due process claim. The court took the position that McCleskey's argument, while couched in terms of "arbitrary and capricious," fundamentally contended that the Georgia death penalty was applied on the basis of a morally impermissible criterion, the race of the victim.

[11] The district court's theory derives some support from the Supreme Court's decision in Zant v. Stephens, 462 U.S. 862. 103 S.Ct. 2723. 77 L.Ed.2d 235 (1983). The Court there recognized that a state may not attach the "aggravating" label as an element in capital sentencing to factors that are constitutionally impermissible or totally irrelevant to the sentencing process. such as race. If that were done, the Court said. "due process would require that the jury's decision to impose death be set aside." Id. 462 U.S at - 103 S.Ct at 2747. 77 LEd.2d at 255. From this language it is clear that due process would prevent a state from explicitly making the murder of a white victim an aggravating circumstance in capital sentencing But where the statute is facially neutral, a due process claim must be supported by proof that a state, through its prosecutors, jurom, and judges, has implicitly attached the aggravating label to race

[12.13] Even if petitioner had characterized his claim as one under the due process clause, it would not have altered the legal standard governing the showing he must make to prevail. The application of the due process clause is "an uncertain enterprise which must discover what fundar ental fairness' consists of in a particuhar situation by first considering any relevant precedents and then by assessing the several interests that are at stake." Lassiter v. Department of Social Services, 452 U.S. 18, 24-25, 101 S.Ct. 2153, 2158-2159. 68 L.Ed.2d 640 (1981). Due process also requires the assessment of the risk that the procedures being used will lead to erroneous decisions. Mathews v. Eldridge, 424 U.S. 319, 335, 96 S.Ct 893, 903, 47 L.Ed.2d 18 (1976). Where a due process claim requires a court to determine whether the race of the victim impermissibly affected the capital sentencing process, decisions under the equal protection clause, characterized as "central to the Fourteenth Amendment's prohibition of discriminatory action by the State." Rose r. Mitchell, 443 U.S. 545, 554-55, 99 S.CL 2993, 2999-3000. 61 LEd.2d 739 (1979), are certainly "relevant precedents" in the assessment of the risk of erroneous decisions. Thus, as in the equal protection context, the claimant under a due process theory must present evidence which establishes that in the capital sentencing process race "is a motivating factor in the decision." Village of Arington Heights v. Metropolitan Housing Depelopment Corp., 429 U.S. 252, 266, 97 S.Ct. 555, 563, 50 L.Ed.2d 450 (1977).

- [14] Due process and cruel and unusual punishment cases do not normally focus on the intent of the governmental actor. But where racial discrimination is claimed, not on the basis of procedural faults or flaws in the structure of the law, but on the basis of the decisions made within that process, then purpose, intent and motive are a natural component of the proof that discrimination actually occurred.
- [15] The Supreme Court has clearly held that to prove a constitutional claim of racial discrimination in the equal protection

context, intent, purpose, and motive are necessary components. Washington v. Daris, 426 U.S. 229, 238-42, 96 S.Ct. 2040, 2046-49, 48 L.Ed.2d 597 (1976). A showing of a disproportionate impact alone is not sufficient to prove discriminatory intent unless no other reasonable inference can be drawn. Arlington Heights, 429 U.S. at 264-66, 97 S.Ct. at 562-64. This Circuit has consistently applied these principles of law. Adams v. Wainwright, 709 F.2d 1443, 1449 (11th Cir. 1983), cert dented.—U.S.—, 104 S.Ct. 745, 79 L.Ed.2d 203 (1984); Sullivan v. Wainwright, 721 F.2d 316, 317 (11th Cir. 1983).

(16) We, therefore, hold that proof of a disparate impact alone is insufficient to invalidate a capital sentencing system, unless that disparate impact is so great that it compels a conclusion that the system is unprincipled, irrational, arbitrary and capricious such that purposeful discrimination—i.e. race is intentionally being used as a factor in sentencing—can be presumed to permeate the system.

Generalized Statistical Studies and the Constitutional Standard

(17) The question initially arises as to whether any statewide study suggesting a racial disparity in the application of a state's death penalty could ever support a constitutional attack on a defendant's sentence. The answer lies is whether the statistical study is sufficient evidence of the ultimate fact which must be shown.

In Smith v. Balkcom. 671 F 2d 858 859 (5th Cir Unit B), cert. demied. 459 U.S. 682, 103 S.Cu. 181, 74 L.Ed.2d 148 (1982), this Court said:

In some instances, circumstantial or statustical evidence of racially disproportionate impact may be so strong that the results permit no other inference but that they are the product of a racially discriminatory intent or purpose.

This statement has apparently caused some confusion because it is often cited as a proposition for which it does not stand. Petitioner argues that his statistical study

disparity based on race. That is only the first step, however. The second step focuses on how great the disparity is. Once the disparity is proven, the question is whether that disparity is sufficient to compel a conclusion that it results from discriminatory intent and purpose. The key to the problem lies in the principle that the proof, no matter how strong, of some disparity is alone insufficient.

In Spinkellink v. Wainwright, 578 F.2d 582, 612 (5th Cir.1978), cert. denied, 440 U.S. 976, 99 S.Ct. 1548, 59 LEd.2d 796 (1979), the petitioner claimed the Florida statute was being applied in a discriminatory fashion against defendants murdering whites, as opposed to blacks, in violation of the cruel and unusual punishment and equal protection components of the Constitution. Evidence of this disparity was introduced through expert witnesses. The court assumed for sake of argument the accuracy of petitioner's statistics but rejected the Eighth Amendment argument. The court rejected the equal protection argument because the disparity shown by petitioner's statistics could not prove racially discriminatory intent or purpose as required by Washington v. Davis, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976). and Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252. 97 S.CL 555, 50 L.Ed.2d 450 (1977). 578 F.2d at 614-16

In Adams v. Wainwright, 109 F.2d 1443 (11th Cir. 1983), cert denied. - U.S. -104 S.Ct. 745, 79 L.Ed.2d 203 (1984), the court, in denying an evidentiary hearing, accepted statistics which arguably tended to support the claim that the Florida death penalty was imposed disproportionately in cases involving white victims. The court then said:

Disparate impact alone is insufficient to establish a violation of the fourteenth amendment. There must be a showing of an intent to discriminate . . Only if the evidence of disparate impact is so strong that the only permissible inference is one of intentional discrimination will it alone suffice.

shows a strong inference that there is a 709 F.2d at 1449 (citations omitted). Here again, in commenting on the strength of the evidence, the court was referring not to the amount or quality of evidence which showed a disparate impact, but the amount of disparate impact that would be so strong as to lead inevitably to a finding of motivation and intent, absent some other explanation for the disparity.

In commenting on the proffer of the Bal-

dus study in another case. Justice Powell wrote in dissent from a stay of execution pending en banc consideration of this case: If the Baldus study is similar to the several studies filed with us in Sullivan r. Wainwright - U.S. - 104 S.Ct. 90, 78 L.Ed.2d 266 (1983), the statistics in studies of this kind, many of which date as far back as 1948, are merely general ularized with respect to any alleged "in-

statistical surveys that are hardly portictentional" racial discrimination. Surely, no contention can be made that the entire Georgia judicial system, at all levels, operates to discriminate in all cases. Arguments to this effect may have been directed to the type of statutes addressed in Furman v Georgia, 408 U.S. 238 [92 S.Ct. 2726. 33 L.Ed.2d 346] (1972). As our subsequent cases make clear, such arguments cannot be taken seriously under statutes approved in Gregg Stephens v. Kemp. - U.S. - -

104 S.Ct. 562, 564 n. 2, 78 L.Ed.2d 370, 374 n. 2 (1984) (Powell, J., dissenting)

The lesson from these and other cases must be that generalized statistical studies are of little use in deciding whether a particular defendant has been unconstitutionally sentenced to death. As to whether the system can survive constitutional attack. statistical studies at most are probative of how much disparity is present, but it is a legal question as to how much disparity is required before a federal court will accept it as evidence of the constitutional flaws in

This point becomes especially critical to a court faced with a request for an evidentiary hearing to produce future studies which say, an evidentiary hearing would be necessary to hear any evidence that a particular defendant was discriminated against because of his race. But general statistical studies of the kind offered here do not even purport to prove that fact. Aside from that kind of evidence, however, it would not seem necessary to conduct a full evidentiary hearing as to studies which do nothing more than show an unexplainable disparity. Generalized studies would appear to have bittle hope of excluding every possible factor that might make a difference between crimes and defendants, exclusive of race. To the extent there is a subjective or judgmental component to the discretion with which a sentence is invested, not only will no two defendants be seen identical by the sentencers, but no two sentencers will see a single case precisely the same. As the court has recognized. there are "countless racially neutral variables" in the sentencing of capital cases. Smith v. Baikcom. 671 F 2d at 859

This is not to recede from the general proposition that statistical studies may reflect a disparity so great as to inevitably lead to a conclusion that the disparity results from intent or motivation. As decided by this opinion, the Baldus studies demonstrate that the Georgia system does not contain the level of disparity required to meet that constitutional standard.

Validity of the Baldus Study

The social science research of Professor Baldus purports to reveal, through statistical analysis, dispartities in the sentencing of black defendants in white victim cases in Georgia. A study is valid if it measures what it purports to measure. Different studies have different levels of validity. The level of the validity of the study is directly related to the degree to which the social scientist can rely on the findings of the study as measuring what it claims to measure.

The district court held the study to be Stan invalid because of perceived errors in the 1781 data base, the deficiencies in the models, the sand the multi-coilinearity existing between 52(a)

the independent variables. We hold in this case that even if the statistical results are asked to hear any evidence that a particular defendant was discriminated against because of his race. But general statistical studies of the kind offered here do not even purport to prove that fact. Aside from that kind of evidence, however, it would

The district court undertook an extensive review of the research presented. It received, analyzed and dealt with the complex statistics. The district court is to be commended for its outstanding endeavor in the handling of the detailed aspects of this case, particularly in light of the consistent arguments being made in several cases based on the Baldus study. Any decision that the results of the Baldus study justify habeas corpus relief would have to deal with the district court's findings as to the study itself. Inasmuch as social science research has been used by appellate courts in decisionmaking, Muller v Oregon, 208 U.S. 412, 419-21, 28 S.Ct. 324, 325-26, 52 L.Ed. 551 (1908), and has been tested like other kinds of evidence at trial see Spink ellink v. Wainumght, 578 F 2d 582, 612-13 (5th Cir.1978), there is a question as to the standard of review of a trial court's finding based on a highly complex statistical study

- [18] Findings of fact are reviewed under the clearly erroneous standard which the Supreme Court has defined as [a] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." Inited States v. United States Gypsiam Co. 330 U.S. 364, 295 68 S.Ct. 525, 542, 92 L.Ed. 746 (1949).
- [19] Whether a disparate impact reflects an intent to discriminate is an ultimate fact which must be reviewed under the clearly erroneous standard Pallman-Scandard v Swint, 456 U.S. 273, 102 S.Ct. 1751, 72 L.Ed.2d.66 (1992). In Pallman the Supremo Court said that Fed.R.Civ.P. 52(a)

exclude certain categories of factual findings from the obligation of a court of appeals to accept a district court's findings unless clearly erroneous. It does not divide facts into categories; in particular, it does not divide findings of fact into those that deal with 'ultimate' and those that deal with 'subsidiary' facts. 456 U.S. at 257, 102 S.Ct. at 1789

There would seem to be two levels of findings based on statistical evidence that must be reviewed: first the finding concerning the validity of the study itself, and second, the finding of ultimate fact based upon the circumstantial evidence revealed by the study, if valid.

The district court here found the study invalid. The court found the statistics of the study to be particularly troublesome in the areas of the data base, the models and the relationship between the independent variables. McCleskey v. Zant. 580 F. Supp. 338, 379 (N.D.Ga.1984). We pretermit a review of this finding concerning the validity of the study itself. The district court went on to hold that even if the statistics did validly reflect the Georgia system, the ultimate fact of intent to discriminate was not proven. We review this finding of fact by assuming the validity of the study and rest our holding on the decision that the study, even if valid, not only supports the district judge's decision under the clearly erroneous standard of review, but compels

Sufficiency of Baidus Study

McCleskey argues that, although the post-Furmen statute in Georgia now yields more predictable results, the race of the victim is a significant but of course impermissible factor which accounts for the imposition of the death penalty in many cases. He supports this argument with the sophisticated Baidus statistical study that after controlling for the legitimate factors that might rationally explain the imposition of the penalty, purportedly reveals significant race-of-the-neum influence in the system. i.e., all other things being equal, white victim crimes are more likely to result in

does not make exceptions or purport to the penalty. Because the Constitution prohibits the consideration of racial factors as justification for the penalty, McCleskey asserts that the discernible racial influence on sentencing renders the operation of the Georgia system infirm.

In addition, McCleskey asserts that the race-of-the-victum influence on the system is particularly significant in the range of cases involving intermediate levels of aggravation (mid-range aggravation cases). He argues that because his case fell within that range, he has established that impermissible racial considerations operated in his case

We assume without deciding that the Baldus study is sufficient to show what it purports to reveal as to the application of the Georgia death penalty. Baldus concluded that his study showed that systemand and substantial disparities existed in the penalties imposed upon homicide defendants in Georgia based on race of the homicide victim, that the disparities existed at a less substantial rate in death sentencing based on race of defendants, and that the factors of race of the victim and defendant were at work in Fulton County

A general comment about the limitations on what the Baldus study purports to show, although covered in the subsequent discussion, may be heipful. The Baldus study statistical evidence does not purport to show that McCleskey was sentenced to death because of either his race or the race of his victim. It only shows that in a group involving blacks and whites, all of whose cases are virtually the same, there would be more blacks receiving the death penalty than whites and more murderers of whites receiving the death penalty than murderers of blacks. The statisticians "best guess" is that race was a factor in those cases and has a role in sentencing structure in Georgia. These general statements about the results are insufficient to make a legal determination. An analysis must be made as to how much disparity is actually shown by the research.

Accepting the Baldus figures, but not the general conclusion, as accurately reflecting the Georgia experience, the statistics are inadequate to entitle McCleskey to relief on his constitutional claim.

The Georgia-based retrospective study consisted of a stratified random sample of 1,066 cases of individuals indicted for murder-death, murder-life and voluntary manslaughter who were arrested between March 25, 1973 and December 31, 1978. The data were compiled from a 41-page questionnaire and consisted of more than 500,000 entries. Through complex statistical analysis. Baldus examined relationships between the dependent variable, death-sentencing rate, and independent variables. nine aggravating and 75 mitigating factors. while controlling for background factors In 10% of the cases a penalty trial was held, and in 5% of the cases defendants were sentenced to death.

The study subjects the Georgia data to a multitude of statistical analyses, and under each method there is a statistically significant race-of-the-victum effect operating statewide. It is more difficult, however, to ascertain the magnitude of the effect demonstrated by the Baidus study. The simple, unadjusted figures show that death sentences were imposed in 11% of the white vicum cases potentially eligible for the death penalty, and in 1% of the eligible black victim cases. After controlling for various legitimate factors that could explain the differential. Baldus still concluded that there was a significant race-of-the-victim effect. The result of Baldus most conclusive model, on which McCleskey primarily relies, showed an effect of 06, signifying that on average a white victim crime is 67 more likely to result in the sentence than a comparable black victim crime Baldus also provided tables that showed the race-of-the-victim effect to be most significant in cases involving intermediate levels of aggravation. In these cases, on average, white victim crimes were shown to be 20% more likely to result in the death penalty than equally aggravated black victim. comes.

None of the figures mentioned above is a definitive quantification of the influence of

the victim's race or the overall likelihood of the death penalty in a given case. Nevertheless, the figures all serve to enlighten us somewhat on how the system operates. The 65 average figure is a composite of all cases and contains both low aggravation cases, where the penalty is almost never imposed regardless of the victim's race. and high aggravation cases, where both white and black victim crimes are likely to result in the penalty. When this figure is related to tables that classify cases according to the level of aggravation, the 67average figure is properly seen as an aggregate containing both cases in which race of the victim is a discernible factor and those in which it is not.

McCleskey's evidence, and the evidence presented by the state, also showed that the race-of-the-victim factor diminishes as more variables are added to the model. For example, the bottom line figure was 17% in the very simple models, dropped to 6% in the 230-variable model, and finally fell to 4% when the final 20 variables were added and the effect of Georgia Supreme Court review was considered.

The statistics are also enlightening on the overall operation of the legitimate factors supporting the death sentence. The Baldus study revealed an essentially rational system, in which high aggravation cases were more likely to result in the death sentence than low aggravation cases. As one would expect in a rational system, factors such as torture and multiple victims greatly increased the likelihood of receiving the penalty

There are important dimensions that the statistics cannot reveal. Baldus testified that the Georgia death penalty system is an extremely complicated process in which no single factor or group of factors determines the outcome of a given case. No single petitioner could, on the basis of these statistics alone establish that he received the death sentence because, and only because his victim was white. Even in the mid-range of cases, where the race-of-the-victim influence is said to be strong legitimate factors justifying the penulty

are, by the very definition of the midrange, present in each case.

The statistics show there is a race-of-thevictim relationship with the imposition of the death sentence discernible in enough cases to be statistically significant in the system as a whole. The magnitude cannot be called determinative in any given case.

The evidence in the Baldus study seems to support the Georgia death penalty system as one operating in a retional manner. Although no single factor, or combination of factors, will prefutably lead to the death sentence in every case, the system in operation follows the pattern the legislature intended, which the Supreme Court found constitutional in Gregg, and sorts out cases according to levels of aggravation, as gauged by legitimate factors. The fundamental Eighth Amendment concern of Furman, as discussed in Gregg, which states that "there is no meaningful basis for distinguishing the few cases in which [the death sentence] is imposed from the many in which it is not" does not accurately describe the operation of the Georgia statute. 425 US at 188. 96 S.Ct. at 2932.

[20] Taking the 5% bottom line revealed in the Baldus figures as true, this figure is not sufficient to overcome the presumption that the statute is operating in a constitutional manner. In any discretionary system, some imprecision must be tolerated, and the Baldus study is simply insufficient to support a ruling, in the context of a statute that is operating much as infended, that racial factors are playing a role in the outcome sufficient to render the system as a whole arbitrary and capricious.

This conclusion is supported, and possibly even compelled, by recent Supreme Court opinions in Sullivan v. Warnwight, — U.S. —, 104 S.Ct. 450, 78 L.Ed.2d 210 (1982) (denying stay of execution to allow evidentiary hearing on Eighth Amendment claim supported by statistics). Warnwight v. Adams. — U.S. —, 104 S.Ct. 2180, 80 L.Ed.2d 809 (1984) (vacating stay): and Warnwight v. Fond. — U.S. —, 104 S.Ct. 2478, 82 L.Ed.2d 911 (1984) (denying state's application to vacate stay on other

grounds). A plurality of the Court in Ford definitively stated that it had held "in two prior cases that the statistical evidence relied upon by Ford to support his claim of discrimination was not sufficient to raise a substantial ground upon which relief might be granted." Id. at - 104 S.Ct. at 3499 82 LEd.2d at 912 (citing Sullivan and Adams). The petitioners in Sullivan, Adams. and Ford all relied on the study by Gross and Mauro of the Florida death penalty system. The bottom line figure in the Gross and Mauro study indicated a race-of-the-victim effect, quantified by a "death odds multiplier," of about 4.8 to 1. Using a similar methodology. Baldus obtained a death odds multiplier of 4.3 to 1 in Georgia.

It is of course possible that the Supreme Court was rejecting the methodology of the Florida study, rather than its bottom line. It is true that the methodology of the Baldus study is superior. The posture of the Florida cases, however, persuades this Court that the Supreme Court was not relying on inadequacies in the methodology of the Florida study. The issue in Sullivan. Adams, and Ford was whether the petitioner's proffer had raised a substantial ground sufficient to warrant an evidentiar; hearing. In that context, it is reasonable to suppose that the Supreme Court looked at the bottom line indication of racial effect and held that it simply was insufficient to state a claim. A contrary assumption, that the Supreme Court analyzed the extremely complicated Gross and Mauro study and rejected it on methodological grounds, is much less reasonable.

Thus, assiming that the Supreme Court in Sulfirem, Adoms and Ford found the bottom line in the Gross and Mauro study insufficient to raise a constitutional claim, we would be compelled to reach the same result in analyzing the sufficiency of the comparable bottom line in the Baldus study on which McCleskey relies.

McCleskey's argument about the heightened influence of the race-of-the-victim factor in the mid-range of cases requires a somewhat different analysis. McCleskey's case falls within the range of cases involving intermediate levels of aggravation. The Baldus statistical study tended to show that the race-of-the-victim relationship to sentencing outcome was greater in these cases than in cases involving very low or very high levels of aggravation.

The race-of-the-victim effect increases the likelihood of the death penalty by approximately 20% in the mid-range of cases. Some analysis of this 20% figure is appropriate

The 20% figure in this case is not anaiogous to a figure reflecting the percentage disparity in a jury composition case. Such a figure represents the actual disparity between the number of minority persons on the jury venire and the number of such persons in the population. In contrast, the 20% disparity in this case does not purpor. to be an actual disparity. Rather, the figare reflects that the variables included in the study do not adequately explain the 20% disparity and that the statisticians can explain it only by assuming the racial effect. More importantly. Baidus did not testify that he found statistical significance in the 20% disparity figure for mid-range cases, and he did not adequately explain the rationale of his definition of the midrange of cases. His testimony leaves this Court unpersuaded that there is a rationally classified, well-defined class of cases in which it can be demonstrated that a raceof-the-victim effect is operating with a magnitude approximating 20%

[21] Assuming arguendo, however, that the 20% disparity is an accurate figure, it is apparent that such a disparity only in the mid-range cases and not in the system as a whole, cannot provide the basis for a systemwide challenge. As previously discussed, the system as a whole is operating in a rational manner, and not in a manner that can fairly be labeled arbitrary or capricious. A valid system challenge cannot be made only against the mid-range unconstitutional in application where that of cases. Baldus did not purport to define discretion achieved different results for the mid-range of cases, nor is such a defiaution possible. It is simply not satisfactory to say that the racial effect operates in ference. The discretion is narrow focused

"close cases" and therefore that the death penalty will be set aside in "close cases."

[22] As discussed previously, the statusties cannot show that the race-of-the-victim factor operated in a given case, even in the mid-range. Rather, the statistics show that, on average, the race-of-the-victim factor was more likely to affect the outcome in mid-range cases than in those cases at the high and low ends of the spectrum of aggravation. The statistics alone are insufficient to show that McCleskey's sentence was determined by the race of his victim, or even that the race of his victim contributed to the imposition of the penalty in his case

McCleskey's petition does not surmount the threshold burden of stating a claim on this issue. Aside from the statistics, he presents literally no evidence that might tend to support a conclusion that the race of McCleskey's victim in any way motivated the jury to impose the death sentence in his case

### Conclusion

The Supreme Court has held that to be constitutional the sentencer in death sentence cases must have some measure of discretion. Grego v. Georgia, 425 U.S. 183 96 S.Ct 2909, 49 L.Ed.2d 859 (1976): Pend fitt v. Florida 428 U.S. 242, 96 S.Ct. 2960 49 LEd.21 913 (1976). The mandatory death sentence statutes were declared unconsututional Woodson v. North Caroline. 425 L' S. 250, 96 S.Ct. 2978, 49 L '4.24 944 (1976): Roberts v. Louisiana 428 ". 5. 325, 96 S.Ct 3001, 49 L.Ed.2d 9"4 (19.5)

The very exercise of discretion means that persons exercising discretion may reach different results from exact dupilcates. Assuming each result is within the range of discretion, all are correct in the eyes of the law. It would not make sense for the system to require the exercise of discretion in order to be facually consultational, and at the same time hold a system what appear to be exact duplicates, absent the state showing the reasons for the adand directed, but still there is a measure of discretion.

The Baidus approach, however, would take the cases with different results on what are contended to be duplicate facts, where the differences could not be otherwise explained, and conclude that the different result was based on race alone. From a legal perspective, petitioner would argue that since the difference is not explained by facts which the social scientist thinks satisfactory to explair, the differences, there is a prima facie case that the difference was based on unconstitutional factors, and the burden would shift to the state to prove the difference in results from constitutional considerations. This approach ignores the realities. It not only gnores quantitative differences in cases: looks, age, personality, education, profession, job, clothes, demeanor, and remorse, just to name a few, but it is incapable of measuring qualitative differences of such things as aggravating and mitigating factors. There are, in fact, no exact duplicates in capital crimes and capital defendants. The type of research submitted here tends to show which of the directed factors were effective, but is of restricted use in showing what undirected factors control the exercise of constitutionally required discretion.

It was recognized when Gregg was decided that the capital justice system would not be perfect, but that it need not be perfect in order to be constitutional. Justice White said:

Petitioner has argued, in effect, that no matter how effective the death penalty may be as a punishment, government, created and run as it must be by humans, is inevitably incompetent to administer it. This cannot be accepted as a proposition of constitutional law. Imposition of the death penalty is surely an awesome responsibility for any system of justice and those who participate in it. Mistakes will be made and discriminations will occur which will be difficult to explain. However, one of society's most basic tasks is that of protecting the lives of its citizens.

and one of the most basic ways in which it achieves the task is through criminal laws against murder.

Gregg v. Georgia, 428 U.S. 153, 226, 96 S.Ct. 2909, 2949, 49 L.Ed.2d 859 (1976) (White, J., concurring).

The plurality opinion of the Gregg Court noted:

The petitioner's argument is nothing more than a veiled contention that Furman indirectly outlawed capital punishment by placing totally unrealistic conditions on its use. In order to repair the alleged defects pointed to by the petitioner, it would be necessary to require that prosecuting authorities charge a capital offense whenever arguably there had been a capital murder and that they refuse to plea bargain with the defendant. If a jury refused to convict even though the evidence supported the charge, its verdict would have to be reversed and a verdict of guilty entered or a new trial ordered, since the discretionary act of jury nullification would not be permitted. Finally, acts of executive clemency would have to be prohibited. Such a system, of course, would be totally alien to our notions of criminal justice.

Id at 199 n. 50, 96 S.Ct. at 2937 n. 50 (opinion of Stewart, Powell, and Stevens, JJ.).

Viewed broadly, it would seem that the statistical evidence presented here, assuming its validity, confirms rather than condemns the system. In a state where past discrimination is well documented, the study showed no discrimination as to the race of the defendant. The marginal disparity based on the race of the victim tends to support the state's contention that the system is working far differently from the one which Furman condemned. In pre-Furman days, there was no rhyme or resson as to who got the death penalty and who did not. But now, in the vast majority of cases, the reasons for a difference are well documented. That they are not so clear in a small percentage of the cases is no reason to declare the entire system unconstitutional

The district court properly rejected this aspect of McCleskey's claim.

# OF COUNSEL

McCleskey contends his trial counsel rendered ineffective assistance at both guilt/innocence and penalty phases of his trial in violation of the Sixth Amendment.

[23, 24] Although a defendant is constitutionally entitled to reasonably effective assistance from his attorney, we hold that McCleskey has not shown he was prejudiced by the claimed defaults in his counsel's performance. Ineffective assistance warrants reversal of a conviction only when there is a reasonable probability that the attorney's errors altered the outcome of the proceeding. A court may decide an ineffectiveness claim on the ground of lack of prejudice without considering the reasonableness of the attorney's performance. Strickland v. Washington. — U.S. ——. 104 S.Ct. 2052. 80 L.Ed.2d 674 (1984).

As to the guilt phase of his trial. McCleskey claims that his attorney failed to: (1) interview the prisoner who testified that McCleskey gave a jail house confession. (2) interview and subpoena as defense witnesses the victims of the Dixie Furniture Store robbery; and (3) interview the State's ballistics expert.

- [25] McCleskey demonstrates no prejudice caused by his counsel's failure to interview Offie Evans. We have held there was no reasonable likelihood that the disclosure of the detective's statement to Offie Evans would have affected the verdict. There is then no "reasonable probability" that the attorney's failure to discover this evidence affected the verdict.
- [26] As to the robbery victims, McCleskey does not contend that an in-person interview would have revealed something their statements did not. He had an opportunity to cross-examine several of the robbery victims and investigating officers at McCleskey's preliminary hearing. The reasonableness of the attorney's investigation

need not be examined because there was obviously no prejudice.

- [27] The question is whether it was unreasonable not to subpoens the robbery victims as defense witnesses. McCleskey's attorney relied primarily on an alibi defense at trial. To establish this defense, the attorney put McCleskey on the stand He also called several witnesses in an attempt to discredit a Dixie Furniture Store employee's identification of McCleskey and to show that McCleskey's confession was involuntary. It would have undermined his defense if the attorney had called witnesses to testify as to which robber did the shooting. No prejudice can be shown by failing to subpoens witnesses as a reasonable strategy decision.
- [23] McCleskey's attorney could have reasonably prepared to cross-examine the State's ballistics expert by reading the expert's report. No in-person interview was necessary. See Washington v. Wathins. 655 F.2d 1346, 1358 (5th Cir.1981), cert denied, 456 U.S. 949, 102 S.Ct. 2021, 72 L.Ed.2d 474 (1982). The report was in the prosecutor's file which the attorney reviewed and no contention has been made that he did not read it.

As to the sentencing phase of his trial, McCleskey asserts his attorney failed to investigate and find character witnesses and did not object to the State's introduction of prior convictions which had been set aside.

(29) No character witnesses testified for McCleskey at his thal. At the State habeas corpus hearing McCleskey's attorney testified he talked with both McCleskey and his sister about potential character witnesses. They suggested no possibilities. The sister refused to testify and advised the attorney that their mother was too sick to travel to the site of the thal. McCleskey and his sister took the stand at the State habeas corpus hearing and told conflicting stories. It is clear from the state court's opinion that it believed the attorney.

Despite the conflicting evidence on his point, ... the Court is authorized in its

role as fact finder to conclude that Counsel made all inquiries necessary to present an adequate defense during the sentencing phase. Indeed, Counsel could not present evidence that did not exist. Although this "finding of fact" is stated in terms of the ultimate legal conclusion, implicit in that conclusion is the historical finding that the attorney's testimony was credible. See Paston v. Jarris, 735 F.2d 1306, 1308 (11th Cir.1984); Cor v. Montgomery, 718 F.2d 1036 (11th Cir.1983). This finding of fact is entitled to a presumption of correctness. Based on the facts as testified to by the attorney, he conducted a reasonable investigation for character witnesses.

(30) As evidence of an aggravating circumstance the prosecutor introduced three convictions resulting in life sentences, all of which had been set aside on Fourth Amendment grounds. This evidence could not result in any undue prejudice, because although the convictions were overturned, the charges were not dropped and McCleskey pleaded guilty and received sentences of 18 years. The reduction in sentence was disclosed at trial.

The district court properly denied relief on the ineffectiveness of counsel claim.

# DEATH-ORIENTED JURY

[31] Petitioner claims the district court improperly upheld the exclusion of jurors who were adamantly opposed to capital punishment. According to petitioner, this exclusion violated his right to be tried by an impartial and unbiased jury drawn from a representative cross-section of his community. In support of this proposition, petitioner cites two district court opinions from outside circuits. Grigsby v. Mabry. \$69 F Supp. 1273 (E.D Ark.1983), hearing en bane ordered. No. 83-2113 E.A 15th Cir Nov. 8. 1980) argued (March 15, 1984) and Keeten v. Garrison. 578 F.Supp. 1164 (W.D.N.C.1984), ret d. 742 F.2d 129 (4th Cir.1954) Whatever the merits of those opinions, they are not controlling authority for this Court.

Because both jurors indicated they would not under any circumstances consider imposing the death penalty, they were properly excluded under Witherspoon r. Illinois. 391 U.S. 510. 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). See also Boulden v. Holman, 394 U.S. 478. 89 S.Ct. 1138. 22 L.Ed.2d 433 (1969). Their exclusion did not violate petitioner's Sixth Amendment rights to an impartial. community-representative jury Smith v. Balkcom, 660 F.2d 573, 582-83 (5th Cir. Unit B 1981), cert denied, 459 U.S. 882, 103 S.CL 161, 74 LEd.2d 148 (1982): Spinkellink v. Wainwright, 578 F.2d 582, 593-94 (5th Cir.1978), cert. denied. 440 U.S. 976. 99 S.Ct. 1548. 59 L.Ed.2d 796 (1979).

### THE SANDSTROM ISSUE

The district court rejected McCleskey's claim that the trial court's instructions to the jury on the issue of intent deprived him of due process by shifting from the prosecution to the defense the burden of proving beyond a reasonable doubt each essential element of the crimes for which he was tried. Such burden-shifting is unconstitutional under Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979).

McCleakey objects to the following portion of the trial court's instruction to the jury.

One section of our law says that the acts of a person of sound mind and discretion are presumed to be the product of the person's will, and a person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts but both of these presumptions may be rebutted.

In its analysis of whether this instruction was unconstitutional under Sandstrom, the district court examined two recent panel opinions of this Circuit. Frankin va. Frances. 700 F 2d 1206 (11th Cir 1980). cert granted. — U.S. — 104 S Ct. 2617. S1 L Ed.2d ST3 (1984), and Tucker v. Frances. 720 F 2d 1504 (11th Cir), or pet for ren'g and reh g er banc, 720 F 2d 1518 (11th Cir 1984). Even though the jury in-

structions in the two cases were identical, Franklin held that the language created a mandatory rebuttable persumption violative of Sandstrom while Tucker held that it created no more than a permissive inference and did not violate Sandstrom. Noting that the challenged portion of the instruction used at McCleskey's trial was "virtually identical" to the corresponding portions of the charges in Francia in and Tucker, the district court elected to follow Tucker as this Court's most recent pronouncement on the issue, and it held that Sandstrom was not violated by the charge on intent.

Since the district court's decision, the en banc court has heard argument in several cases in an effort to resolve the constitutionality of potentially burden-shifting instructions identical to the one at issue here. Davis v. Zant, 721 F.2d 1478 (11th Cir. 1983), on pet for reh'g and reh'g en banc. 729 F 2d 492 (11th Cir.1984); Drake v. Francis. 727 F.2d 990 (11th Cir.), on pet. for rehig and for rehig en banc, 727 F.2d 1003 (11th Cir.1984): Tucker v. Francis. 723 F.2d 1504 (11th Cir.), on pet for rehig and reh'g en bane, 723 F.2d 1518 (11th The United States Supreme Cir. 1984). Court has heard oral argument in Frank lin v. Francis, 53 U.S.L.W. 3373 (U.S. Nov. 20. 1984) [No. 83-1590]. However these cases are decided, for the purpose of this decision, we assume here that the intent instruction in this case violated Sandstrom and proceed to the issue of whether that error was harmless

The Supreme Court requires that "before a federal constitutional error can be harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967). More recently, the Supreme Court has divided over the issue of whether the doctrine of harmless error is ever applicable to burden-shifting presumptions violative of Sandstrom. Reasoning that "[a]n erroneous presumption on a disputed element of the crime renders irrelevant the evidence on the issue because the jury may have relied upon the presumption

rather than upon that evidence," a four-justice plurality held that one of the two tests for harmiess error employed by this Circuit-whether the evidence of guilt is so overwhelming that the erroneous instruction could not have contributed to the jury's verdict-is inappropriate. Connectscut v. Johnson, 460 U.S. 73, 85-87, 103 S.Ct. 969, 976-978, 74 L.Ed.2d 823 (1983). The fifth vote to affirm was added by Justice Stevens, who concurred on jurisdictional grounds. Id. at 88, 103 S.Ct. at 978 (Stevens. J., concurring in the judgment). Four other justices, however, criticized the plurality for adopting an "automatic reversal" rule for Sandstrom error. Id. at 98. 103 S.Ct at 983 (Powell, J., dissenting). The Supreme Court has subsequently reviewed another case in which harmless erfor doctrine was applied to a Sandstrom violation. The Court split evenly once again in affirming without opinion a Sixth Circuit decision holding that "the prejudicial effect of a Sandstrom instruction is largely a function of the defense asserted at tral." Engle v. Koehler, 707 F.2d 241. 246 (6th Cir. 1983). aff'd by an equally dimided court - U.S. - 104 S.Ct. 1673. 80 LEd.2d 1 (1984) (per curiam). In Engle, the Sixth Circuit distinguished between Sandstrom violations where the defendant has claimed nonparticipation in the crime and those where the defendant has claimed lack of mens rea holding that fonly the latter was so prejudicial as never to constitute harmless error. Id. Until the Supreme Court makes a controlling decision on the harmless error question, we continue to apply the standards propounded in our earlier cases

[32] Since Sandstrom was decided in 1979, this Circuit has analyzed unconstitutional burden-shifting instructions to determine whether they constituted harmless error Sec. e.g., Mason v. Balkcom, 669 F.20. 222, 227 (5th Cir. Unit B 1982). In Lamb to Jernigan, 680 F.2d 1332 (11th Cir. 1982), cert. denied, 460 U.S. 1024, 103 S.C. 1076. 75 L.Ed.2d 496 (1983), the Court identified two situations in which an unconstitutional burden-shifting instruction might be harm-



less. First, an erroneous instruction may have been harmless if the evidence of guilt was so overwhelming that the error could not have contributed to the jury's decision to convict. Lamb. 683 F 2d at 1342; Mason, 669 F.2d at 227. In the case before us, the district court based its finding that the Sandstrom violation was harmless on this ground. This Circuit has decided on several occasions that overwhelming evidence of guilt renders a Sandstrom violation harmless. See Jarrell v. Balkcom, 735 F.2d 1242, 1257 (11th Cir.1984); Brooks v. Francis, 716 F.2d 780, 793-94 (11th Cir. 1983), on pet for reh'g and for reh'g en banc, 728 F.2d 1358 (11th Cir. 1984); Spencer v. Zant, 715 F.2d 1562, 1578 (11th Cir 1983), on pet. for reh'g and for reh'g en banc, 729 F.2d 1293 (11th Cir.1984).

[33] Second, the erroneous instruction may be harmless where the instruction shifts the burden on an element that is not at issue at trial. Lamb. 683 F.2d at 1342. This Circuit has adopted this rationale to find a Sandstrom violation harmless. See Drake v. Francis, 727 F.2d 990, 999 (11th Cir.), on pet for reh'g and for reh'g en bane, 727 F 2d 1003 (11th Cir 1984); Collins v. Francis. 728 F.2d 1322. 1330-31 (11th Cir. 1984), pet for rehig en banc demird. 734 F.2d 1481 (11th Cir.1984). There is some indication that even the plurality in Connecticut v. Johnson would endorse this type of harmless error in limited circumstances:

[A] Sandstrom error may be harmless if the defendant conceded the issue of intent... In presenting a defense such as alibi, insanity, or self-defense, a defendant may in some cases admit that the act alleged by the prosecution was intentional, thereby sufficiently reducing the likelihood that the jury applied the erroreast court to consider the error harmless.

460 U.S at 87, 103 5 Ct at 973 (citations omitted).

Our review of the record reveals that the Sandstrom violation in this case is rendered harmless error under this second

test. Before discussing whether intent was at issue in McCleskey's trial, however. we note that intent is an essential element of the crime with which he was charged. Georgia law provides three essential elements to the offense of malice murder: (1) a homicide: (2) malice aforethought; and (3) unlawfulness. Lamb v. Jernigan. 683 F.2d at 1336. The "malice" element means the intent to kill in the absence of provocation. Id. The erroneous instruction on intent, therefore, involved an essential element of the criminal offense charged, and the state was required to prove the existence of that element beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364. 90 S.Ct. 1068, 1072, 25 L.Ed.2d 368 (1970). The question therefore becomes whether McCleskey conceded the element of intent by presenting a defense that admits that the act alleged was intentional.

[34] Of course, a defendant in a criminal trial may rely entirely on the presumption of innocence and the State's burden of proving every element of the crime beyond a reasonable doubt. Connecticut v. Johnson, 460 U.S. at 87 n. 16, 103 S.Ct. at 978 n. 16. In such a case, determining whether a defendant had conceded the issue of intent might well be impossible. The record reveals, however, that McCleskey chose not to take that course. Rather, he took the stand at trial and testified that he was not a participant in the Dixie Furniture Store robbery which resulted in the killing of Officer Schlatt. The end of McCleskey's testimony on direct examination summarizes his alibi defense:

- Q Were you at the Dixie Furniture Store that day?
- A. No.
- Q Did you shoot anyone?
- A. No. I didn't.
- Q is everything you have said the truth?
- A Positive

In closing argument, McCleskey's attorney again stressed his client's alibi defense He concentrated on undermining the credibility of the eyewitness identifications that

pinpointed McCleskey as the triggerman and on questioning the motives of the other robbery participants who had testified that McCleskey had fired the fatal shots. McCleskey's attorney emphasized that

if Mr. McCleskey was in the front of the store and Mr. McCleskey had the silver gun and if the silver gun killed the police officer, then he would be guilty. But that is not the circumstances that have been proven.

Although McCleskey's attorney's arguments were consistent with the alibi testimony offered by McCleskey himself, the jury chose to disbelieve that testimony and rely instead on the testimony of eyewitnesses and the other participants in the robbery.

[35, 36] We therefore hold that in the course of asserting his alibi defense McCleskey effectively conceded the issue of intent thereby rendering the Sandstrom violation harmless beyond a reasonable doubt. In so holding, we do not imply that whenever a defendant raises a defense of alibi a Sandstrom violation on an intent or malice instruction is automatically rendered harmless error. Nor do we suggest that defendant must specifically argue that intent did not exist in order for the issue of intent to remain before the jury. But where the State has presented overwhelming evidence of an intentional killing and where the defendant raises a defense of nonparticipation in the crime rather than lack of mens rea. a Sandstrom violation on an intent instruction such as the one at issue here is harmless beyond a reasonable doubt. See Collins t Francis. 725 F 2d at 1331: Engle v. Koehler, 707 F 2d at 246.

In this case the officer entered and made it almost to the middle of the store before he was shot twice with a .35 caliber Rossi revolver. The circumstances of this shooting, coupled with McCleskey's decision to rely on an alibi defense, elevate to mere speculation any scenario that would create a reasonable doubt on the issue of intent. The district court properly denied habeas corpus relief on this issue.

CONCLUSION

The judgment of the district court in granting the petition for writ of habeas corpus is reversed and the petition is hereby denied.

REVERSED and RENDERED.

TJOFLAT. Circuit Judge, concurring:

I concur in the court's opinion, though ! would approach the question of the constitutional application of the death penalty in Georgia somewhat differently. I would be gin with the established proposition that Georgia's capital sentencing, model is facially constitutional. It contains the safeguards necessary to prevent arbitrary and capricious decision making, including decisions motivated by the race of the defendant or the victim. These safeguards are present in every stage of a capital murder prosecution in Georgia, from the grand jury indictment through the execution of the death sentence. Some of these safeguards are worth repeating.

At the indictment stage, the accused can insist that the State impanel a grand jury that represents a fair cross section of the community, as required by the sixth and fourteenth amendments, and that the State not deny a racial group, in violation of the equal protection clause of the fourteenth amendment, the right to participate as jurous. In Georgia this means that a representative portion of blacks will be on the grand jury.

The same safeguards come into play in the selection of the accused's petit jury. In addition, the accused can challenge for cause any venireman found to harbor a racial bias against the accused or his vicini. The accused can peremptorily excuse jurors suspected of such bias and, at the same time, prevent the prosecutor from exercising his peremptory challenges in a way that systematically excludes a particular class of persons, such as blucks, from jury service. See, e.g., Willis v. Zont. 720 F. 2c 1212 (11th Cir 1980), cort. donted.—U.S.—, 104 S.Ct. 2548, 92 L.Ed. 2d. 851 (1984).

If the sentencer is the jury, as it is in Georgia (the trial judge being bound by the jury's recommendation), it can be instructed to put aside racial considerations in reaching its sentencing recommendation. If the jury recommends the death sentence, the accused, on direct appeal to the Georgia Supreme Court, can challenge his sentence on racial grounds as an independent assignment of error or in the context of proportionality review. And, if the court affirms his death sentence, he can renew his challenge in a petition for rehearing or by way of collateral attack.

In assessing the constitutional validity of Georgia's capital sentencing scheme, one could argue that the role of the federal courts—the Supreme Court on certiforati from the Georgia Supreme Court and the entire federal judicial system in habeas corpus review—should be considered. For they provide still another layer of safe-guards against the arbitrary and capricious imposition of the death penalty.

Petitioner, in attacking his conviction and death sentence, makes no claim that either was motivated by a racial bias in any stage of his criminal prosecution. His claim stems solely from what has transpired in other homicide prosecutions. To the extent that his data consists of cases in which the defendant's conviction and sentencewhether a sentence to life imprisonment or death-is constitutionally unassailable, the data. I would hold, indicates no invidious racial discrimination as a matter of law To the extent that the data consists of convictions and/or sentences that are constitutionally infirm, the data is irrelevant. In summary, petitioner's data, which shows nothing more than disproportionate sentencing results, is not probative of a racially discriminatory motive on the part of any of the participants in Georgia's death penalty sentencing model-either in petitioner's or any other case.

VANCE, Circuit Judge, concurring:

Although I concur in Judge Roney's opinion. I am troubled by its assertion that there is "little difference in the proof that might be required to prevail" under either eighth amendment or fourteenth amendment equal protection claims of the kind presented here! According to Furman. an eighth amendment inquiry centers on the general results of capital sentencing systems, and condemns those governed by such unpredictable factors as chance, caprice or whim. An equal protection inquiry is very different. It centers not on systemic irrationality, but rather the independent evil of intentional, invidious discrimination against given individuals.

I am conscious of the dicta in the various Furman opinions which note with disapproval the possibility that racial discrimination was a factor in the application of the death penalty under the Georgia and Texas statutes then in effect. To my mind, however, such dicta merely indicate the possibility that a system that permits the exercise of standardless discretion not only may be capricious, but may give play to discriminatory motives which violate equal protection standards as well. Whether a given set of facts make out an eighth amendment claim of systemic irrationality under Furman is therefore, a question entirely independent of whether those facts establish deliberate discrimination violative of the equal protection clause.

I am able to concur because in neither the case before us nor in any of the others presently pending would the difference influence the outcome. As Judge Roney points out, petitioner's statistics are insufficient to establish intentional discrimination in the capital sentence imposed in his case. As to the eighth amendment. I coubt that a claim of arbitrariness or caprice is even presented, since putitioner's case is entirely devoted to proving that the death penalty is being applied in an altogether explicable—albeit impermissible—fashion.

tioner did not re's on it in his brief

I have not addressed the due process analysis employed by the district court because the peti-

Claims such as that of petitioner are now presented with such regularity that we may reasonably hope for guidance from the Supreme Court by the time my expressed concerns are outcome determinative in a given case.

KRAVITCH, Creat Judge, concurring: I concur in the majority opinion except as to the Giglio issue. In my view, for reasons stated in Chief Judge Godbold's dissent, the facts surrounding Evans testimony did constitute a Giglio violation. I agree with the majority, however, that any error was harmless beyond a reasonable doubt.

I also join Judge Anderson's special concurrence on the "Constitutional Application of the Georgia Death Penalty."

R. LANIER ANDERSON, III. Circuit Judge, concurring with whom KRAVITCH, Circuit Judge, joins as to the constitutional application of the Georgia Death Statute.

I join Judge Roney's opinion for the majority, and write separately only to emphasize, with respect to the Part entitled "Constitutional Application of Georgia's Death Penalty." that death is different in kind from all other criminal sanctions. Woodson F North Carolina. 428 U.S. 250, 305, 96 S.CL 2978, 2991. 49 L.Ed.2d 944 (1976). Thus, the proof of racial motivation required in a death case, whether pursuant to an Eighth Amendment theory or an equal protection theory, presumably would be less strict than that required in civil cases or in the criminal justice system generally Consututional adjudication would tolerate less risk that a death sentence was influenced by race. The Supreme Court's Eighth Amendment jurisprudence has established a constitutional supervision over the conduct of state death penalty systems which is more exacting than that with respect to the criminal justice system generally Woodson r. North Carolina, id. at 305 96 S.Ct. at 2991 ("Because of that qualitative difference, there is a corre-

sponding difference in the need for reliability in the determination that death is the appropriate punishment."). There is no need in this case, however, to reach out and try to define more precisely what evidentiary showing would be required. Judge Roney's opinion demonstrates with clarity why the evidentiary showing in this case is insufficient.

GODBOLD, Chief Judge, dissenting in part, and concurring in part, with whom JOHNSON, HATCHETT and CLARK, Circuit Judges, join as to the dissent on the Giglio issue.

At the merits trial Evans, who had been incarcerated with McCleskey, testified that McCleskey admitted to him that he shot the policeman and acknowledged that he wore makeup to disguise himself during the robbery. Evans also testified that he had pending against him a [federal] escape charge, that he had not asked the prosecutor to "fix" this charge, and that the prosecutor thad not promised him anything to testify.

At the state habeas hearing the following transpired:

The Court: Mr. Evans, let me ask you a question. At the time that you testified in Mr. McCleskey's trial, had you been promised anything in exchange for your testimony?

The witness: No. I wasn't. I wasn't promised nothing about—I wasn't promised nothing by the D.A. But the Detective told me that he would—he said he was going to do it himself, speak a word for me. That was what the Detective told me.

- By Mr. Stroup
- Q. The Detective told you that he would speak a word for you.
- A. Yeah.
- O That was Detective Dorsey?
- A Yeah.

State Habeas Transcript at 122.

The district court granted habeas relief to McCleskey under Giglio v. U.S. 405

Judge Rone: s opinion on all other issues

<sup>&</sup>quot;I dissent on only the Giglio issue I concur in

(1972). At the threshold the district court pointed out that Giglio applies not only to "traditional deals" made by the prosecutor in exchange for testimony but also to "any promises or understandings made by any member of the prosecutorial team, which includes police investigators." 580 F.Supp. at 380. The court then made these subsidiary findings: (1) that Evans's testimony was highly damaging; (2) that "the jury was clearly left with the impression that Evans was unconcerned about any charges which were pending against him and that no promises had been made which would affect his credibility," id. at 381: (3) that at petitioner's state habeas hearings Evans testified "that one of the detectives investigating the case had promised to speak to federal authorities on his behalf," id; (4) that the escape charges pending against Evans were dropped subsequent to McCleskey's trial.

The en banc court seems to me to err on several grounds. It blurs the proper application of Giglio by focusing sharply on the word "promise." The proper inquiry is not limited to formal contracts, unilateral or bilateral, or words of contract law, but "to ensure that the jury knew the facts that might motivate a witness in giving testimo-Smith v. Kemp. 715 F.2d 1459, 1467 (11th Cir.1983). Gigito reaches the informal understanding as well as the formal. The point is, even if the dealings are informal, can the witness reasonably view the government's undertaking as offering him a benefit and can a juror knowing of it reasonably view it as motivating the witness in giving testimony? The verbal undertaking made in this instance by an investigating state officer, who is a member of the prosecution team, that he will "put in a word for him" on his pending federal charge was an undertaking that a jury was entitled to know about.

Second, the en banc court finds the benefit too marginal. Of course, the possible benefit to a potential witness can be so minimal that a court could find as a matter

1. This was the description given at that by Dr.

U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 of law no Giglio violation occurred. A (1972). At the threshold the district court pointed out that Giglio applies not only to "traditional deals" made by the prosecutor traditional deals made by the pro

Third, the court concludes there was no reasonable likelihood that Evans's testimony affected the judgment of the jury. Co-defendant Wright was the only eyewitness. He was an accomplice, thus his testimony, unless corroborated, was insufficient to establish that McCleskey was the triggerman. The en banc court recognizes this problem but avoids it by holding that Wright's testimony was corroborated by "McCleskey's own confession." This could refer to either of two admissions of guilt by McCleskey. He "confessed" to Wright. but Wright's testimony on this subject could not be used to corroborate Wright's otherwise insufficient accomplice testimony. Testimony of an accomplice cannot be corroborated by the accomplice's own testimony. The other "confession" was made to Evans and testified to by Evans. Thus Evans is not a minor or incidental witness Evans' testimony, describing what McCleskey "confessed" to him, is the corroboration for the testimony of the only eyewitness. Wright. And that eyewitness gave the only direct evidence that McCleskey killed the officer.

The district court properly granted the writ on Giglio grounds. Its judgment should be affirmed.

JOHNSON, Circuit Judge, dissenting in part and concurring in part, with whom HATCHETT and CLARK, Gircuit Judges join:

Warren McCleskey has presented convincing evidence to substantiate his claim that Georgia has administered its death penalty in a way that discriminates on the basis of race. The Baldus Study, charactenzed as "far and away the most complete and thorough analysis of sentencing" ever carried out. demonstrates that in Georgia

Richard Berk, member of a panel of the Nation

a person who kills a white victim has a higher risk of receiving the death penalty than a person who kills a black victim. Race alone can explain part of this higher risk. The majority concludes that the evidence "confirms rather than condemns the system" and that it fails to support a constitutional challenge. I disagree. In my opinion, this disturbing evidence can and does support a constitutional claim under the Eighth Amendment. In holding otherwise, the majority commits two critical errors: it requires McCleskey to prove that the State intended to discriminate against him personally and it underestimates what his evidence actually did prove. I will address each of these concerns before commenuing briefly on the validity of the Baldus Study and addressing the other issues in this case.

I. THE EIGHTH AMENDMENT AND RACIAL DISCRIMINATION IN THE ADMINISTRATION OF THE DEATH PENALTY

McCleskey claims that Georgia administers the death penalty in a way that discriminates on the basis of race. The district court opinion treated this argument as one arising under the Fourteenth Amendment and explicitly rejected the petitioner's claim that he could raise the argument under the Eighth Amendment, as well. The majority reviews each of these possibilities and concludes that there is little difference in the proof necessary to prevail under any of the theones: whatever the constitutional source of the challenge, a petitioner must show a disparate impact great enough to compel the conclusion that purposeful discrimination permeates the system. These positions reflect a misunderstanding of the nature of an Eighth Amendment claim in the death penalty context: the Eighth Amendment prohibits the racially discriminator, application of the

al Academy of Sciences charged with reviewing ail previous research on criminal sentencing issues in order to set standards for the conduct of such research.

death penalty and McCleskey does not have to prove intent to discriminate in order to show that the death penalty is being applied arbitrarily and capriciously.

### A. The Viability of an Eighth Amendment Challenge

As the majority recognizes, the fact that a death penalty statute is facially valid does not foreclose an Eighth Amendment challenge based on the systemwide application of that statute. The district court most certainly erred on this issue. Applying the death penalty in a racially discriminatory manner violates the Eighth Amendment. Several members of the majority in Furman v. Georgia, 408 U.S. 238, 245-57. 310, 364-65, 92 S.Ct. 2726, 2729-36, 2762, 2790-91, 33 L.Ed.2d 346 (1972) (concurring opinions of Douglas. Stewart, Marshall. JJ., relied in part on the disproportionate impact of the death penalty on racial minorities in concluding that the death penalty as then administered constituted arbitrary and capricious punishment

When decisionmakers look to the race of a victim, a factor completely unrelated to the proper concerns of the sentencing process enters into determining the sentence. Reliance on the race of the victim means that the sentence is founded in part on a morally and constitutionally repugnant judgment regarding the relative low value of the lives of black victims. Cf. Zant v. Stephens, 462 U.S. 862, 103 S.Ct. 2733, 77 L Ed 2d 235 (1983) (listing race of defendant as a factor "constitutionally impermissible or totally irrelevant to the sentencing process") There is no legitimate basis in reason for relying on race in the sentencing process. Because the use of race is both irrelevant to sentencing and impermissible. sentencing determined in part by race is arbitrary and capricious and therefore a

clause but expressed the opinion that it might best be understood as a due process claim. It discinnes appear that a different constitutional basis for the claim would have affected the district court's conclusions.

<sup>2.</sup> The district court fell bound by precedent to analyze the claim under the equal protection

violation of the Eighth Amendment. See Furman v. Georgia, 408 U.S. 238, 256, 92 S.Ct. 2726, 2735, 33 L.Ed.2d 346 (1972) (Douglas, J., concurring) ("the high service rendered by the 'cruel and unusual' punishment clause of the Eighth Amendment is to require judges to see to it that general laws are not applied sparsely, selectively, and spottily to unpopular groups").

#### B. The Eighth Amendment and Proof of Discriminatory Intent

The central concerns of the Eighth Amendment deal more with decisionmaking processes and groups of cases than with individual decisions or cases. In a phrase repeated throughout its later cases, the Supreme Court in Gregg r. Georgia, 428 U.S. 153, 195 n. 46, 96 S.Ct. 2909, 2935 n. 46, 49 LEd.2d 859'(1976) (plurality opinion), stated that a "pattern of arbitrary and capricious sentencing" would violate the Eighth Amendment. In fact, the Court has consistently adopted a systemic perspective on the death penalty, looking to the operation of a state's entire sentencing structure in determining whether it inflicted sentences in violation of the Eighth Amendment See, e.g., Eddings r. Oklahoma, 455 U.S. 104, 112, 102 S.Ct. 869, 875, 71 LEd.2d 1 (1982) (capital punishment must be imposed "fairly, and with reasonable consistency, or not at all"); Godfrey v. Georgia. 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980) ("[I]f a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty.").

Without this systemic perspective, review of sentencing would be extremely limited, for the very idea of arbitrary and capricious sentencing takes on its fullest meaning in a comparative context. A nonarbitrary sentencing structure must pro-

The Supreme Coun in Pulley v. Harru.

U.S. — 104 S.Ct. 871, 79 L.Ed.2d 29 (1984),
emphasized the umponance of factors other
than appellate proportionality review that
would control jury discretion and assure that
sentences would not fall into an arbitrary pattern. The decision in Pulley decomphasizes the

vide some meaningful way of distinguishing between those who receive the death sentence and those who do not. Godfrey v. Georgia, 446 U.S. 420, 433, 100 S.Ct. 1759, 1767, 64 L.Ed.2d 398 (1980); Furman v. Georgia, 408 U.S. 238, 313, 92 S.Ct. 2726, 2764, 33 L.Ed.2d 346 (1972) (White, J., concurring). Appellate proportionality review is not needed in every case but consistency is still indispensable to a constitutional sentencing system.<sup>3</sup> The import of any single sentencing decision depends less on the intent of the decisionmaker than on the outcome in comparable cases. Effects evidence is well suited to this type of review.

This emphasis on the outcomes produced by the entire system springs from the State's special duty to insure fairness with regard to something as serious as a death sentence. See Zant v. Stephens. 462 U.S. 862, 103 S.Ct. 2733, 2741, 77 L.Ed.2d 235 (1983): Lockett v. Ohio, 438 U.S. 586, 605. 98 S.Ct. 2954, 2965, 57 L.Ed.2d 973 (1978): Woodson v. North Carolina, 428 U.S. 290 305. 96 S.Ct. 2978. 2991. 49 L.Ed.2d 944 (1976) (plurality opinion). Monitoring patterns of sentences offers an especially effective way to detect breaches of that duty. Indeed, because the death penalty retains the need for discretion to make individualized judgments while at the same time heightening the need for fairness and consistency. Eddings v. Oklahoma, supra. 455 U.S. at 110-12, 102 S.Ct. at 874-75, patterns of decisions may often be the only acceptable basis of review. Discretion hinders inquiry into intent: if unfairness and inconsistency are to be detected even when they are not overwhelming or obvious, effects evidence must be relied upon.

Insistence on systemwide objective standards to guide sentencing reliably prevents aberrant decisions without having to probe the intentions of juries or other decisionmakers. Gregg v. Georgia, supra, 428

importance of evidence of arbitrariness in individual cases and looks eaclusively to "systemic" arbitrariness. The case further underscores this court's responsibility to be alert to claims, such as the one McCleskey makes, that allege more than disproportionality in a single sentence U.S. at 198, 96 S.Ct. at 2936; Woodson v. North Carolina, supra, 425 U.S. at 303, 96 S.Ct. at 2990 (objective standards necessary to "make rationally reviewable the process for imposing the death penalty"). The need for the State to constrain the discretion of juries in the death penalty area is unusual by comparison to other areas of the law. It demonstrates the need to rely on systemic controls as a way to reconcile discretion and consistency; the same combined objectives argue for the use of effects evidence rather than waiting for evidence of improper motives in specific cases.

Objective control and review of sentencing structures is carried so far that a jury or other decisionmaker may be presumed to have intended a non-arbitrary result when the outcome is non-arbitrary by an objective standard: the law, in short, looks to the result rather than the actual motives. In Westbrook v. Zant. TO4 F.2d 1487, 1504 (11th Cir.1983), this Court heid that, even though a judge might not properly instruct a sentencing jury regarding the proper definition of aggravating circumstances, the "uncontrolled discretion of an uninstructed jury" can be cured by review in the Georgia Supreme Court. The state court must find that the record shows

- Lockett v. Ohio. 438 U.S. 386, 98 S.Ct. 2954. 57.
  LEd.2d 973 (1975), and other cases demonstrate that the actual deliberations of the sentencer are relevant under the Eighth Amendment, for mitigating factors must have their proper place in all deliberations. But the sufficiency of intent in proving an Eighth Amendment violation does not imply the necessity of intent for all such claims.
- 5. The only Fifth or Eleventh Circuit cases touching on the issue of discriminatory intent under the Eighth Amendment appear to be inconsistent with the Supreme Court's approach and therefore wrongly decided. The court in Smith v. Bulkcom, 600 F.2d 573, 584 (5th Cir Unit B. 1981), modified, 671 F.2d 538 (5th Cir Unit B. 1981), modified, 671 F.2d 538 (5th Cir 1982), stated that Eighth Amendment challenges based on race require a showing of intent, but the court reached this conclusion because it wrongly believed that Spinkellink v. Wathwinght, 576 F.2d 582 (5th Cir 1975), compelled such a result The Spinkellink court never reached the quits tion of intent, holding that Supreme Court presedent foreclosed all Eighth Amendment challenges except for extreme cases where the sentence is shockingly disproportionale to the crime. 578 F.2d at 606 & n. 28. See supra note

the presence of statutory aggravating factors that a jury could have relied upon. If the factors are present in the record it does not matter that the jury may have misunderstood the role of aggravating circumstances. If the State can unintentionally succeed in preventing arbitrary and capcious sentencing, it would seem that the State can also fail in its duty even though none of the relevant decisionmakers intend such a failure.

In sum, the Supreme Court's systemic and objective perspective in the review and control of death sentencing indicates that a pattern of death sentences skewed by race alone will support a claim of arbitrary and capricious sentencing in violation of the Eighth Amendment. See Furman v. Georgia 406 U.S. 238, 253, 92 S.Ct. 2726 2733. 33 LEd.2d 346 (1972) (Douglas, J., concurring) ("We cannot say that these defendants were sentenced to death because they were black. Yet our task is not restricted to an effort to divine what motives impelled these death penalties."). The majority's holding on this issue conflicts with every other constitutional limit on the death penalty. After today, in this Circuit arbitrariness based on race will be more difficult to

3 The Smith court cites to a portion of the Smikellink opinion dealing with equal protection arguments. 578 F.2c at 614 n. 40. Neither of the cases took note of the most pertinent Eighth Amendment precedents decided by the Supreme Court.

Other Eleventh Circuit cases mention that ha bear corpus petitioners must prove intent to discriminate racially against them personally in the application of the death sentence. But these cases all either treat the claim as though it arose under the Fourteenth Amendment alone or reis on Smith or one of its successors. Ser Su Warmunght, 721 F.2d 31e (11th C:r 1053) Adams v. Wainweight, 700 F.2d 1443 (1)th Cir Of course, to the extent these cases at tempt to foreclose Eighth Amendment chall lenges of this sort or require proof of particular ized intent to discriminate, they are incunsistent with the Supreme Court's interpretation of the Eighth Amendmen: Cf Gates & Collier 501 F 2d 1291, 1306-01 (5th Cir 1974 | prohibition against cruci and unusual punishment "is not limited to specific acts directed at selected individuais

eradicate than any other sort of arbitrariness in the sentencing system.

II. PROVING DISCRIMINATORY EF-FECT AND INTENT WITH THE BALDUS STUDY

The statistical study conducted by Dr. Baldus provides the best possible evidence of racially disparate impact. It began with a single unexplained fact: killers of white victims in Georgia over the last decade have received the death penalty eleven times more often than killers of black victims.4 It then employed several statistical techniques, including regression analysis, to isolate the amount of that disparity attributable to both racial and non-racial factors. Each of the techniques yielded a statistically significant racial influence of at least six percent; in other words, they all showed that the pattern of sentencing could only be explained by assuming that the race of the victim made all defendants convicted of killing white victims at least six percent more likely to receive the death penalty Other factors such as the number of aggravating circumstances or the occupation of the victim could account for some of the eleven-to-one differential, but the race of the victim remained one of the strongest influences.

Assuming that the study actually proves what it claims to prove, an assumption the majority claims to make, the evidence undoubtedly shows a disparate impact. Regression analysis has the great advantage of showing that a perceived racial effect is an actual racial effect because it controls for the influence of non-racial factors. By screening out non-racial explanations for certain outcomes, regression analysis of-

- Among those who were eligible for the death penalty, eleven percent of the killers of white victims received the death penalty, while one percent of the killers of black victims received it.
- 7. In one of the largest of these models, the one focused on by the district court and the majority, the statisticians used 230 different independent variables (possible influences on the pattern of sentencing), including several different aggravating and many possible mitigating factions.

fers a type of effects evidence that approaches evidence of intent, no matter what level of disparity is shown. For example, the statistics in this case show that a certain number of death penalties were probably imposed because of race, without ever inquiring directly into the motives of jurors or prosecutors.

Regression analysis is becoming a common method of proving discriminatory effect in employment discrimination suits. In fact, the Baldus Study shows effects at least as dramatic and convincing as those in statistical studies offered in the past. Cf. Segar v. Smith, 738 F.2d 1249 (D.C Cir. 1984); Wade v. Mississippi Cooperative Extension Service, 528 F.2d 508 (5th Cir. 1976). Nothing more should be necessary to prove that Georgia is applying its death penalty statute in a way that arbitrarily and capriciously relies on an illegitimate factor—race.

Even if proof of discriminatory intent were necessary to make out a constitutional challenge, under any reasonable definition of intent the Baidus Study provides sufficient proof. The majority ignores the fact that McCleskey has shown discriminatory intent at work in the sentencing system even though he has not pointed to any specific act or actor responsible for discriminating against him in particular.

The law recognizes that even though intentional discrimination will be difficult to detect in some situations, its workings are still pernicious and real. Rose v. Mitchell. 442 U.S. 545, 559, 99 S.Ct. 2993, 3001. 61 LEd.2d 739 (1979). Under some circumstances, therefore, proof of discriminator; effect will be an important first step in

- Ser part I, supra. Of course, proof of any significant results effects as enough under the Eighth Amendment, for a requirement of proving large or pervasive effects is tantamount to proof of intent.
- The same factors leading to the conclusion that an Eighth Amendment claim does not require proof of intent militair even more strong by against using too restrictive an understanding of intent.

proving intent, Crauford v. Board of Education, 458 U.S. 527, 102 S.Ct. 3211, 73 L.Ed.2d 948 (1982), and may be the best available proof of intent. Washington v. Davis, 426 U.S. 229, 241-42, 96 S.Ct. 2040, 2048-49, 48 L.Ed.2d 597 (1976); United States v. Teras Educational Agency, 579 F.2d 910, 913-14 & nn. 6-7 (5th Cir.1978), cert. denied, 443 U.S. 915, 99 S.Ct. 3106, 61 L.Ed.2d 879 (1979).

For instance, proof of intentional discrimination in the selection of jurors has traditionally depended on showing racial effects. See Castaneda v. Partida, 430 U.S. 482, 97 S.Ct. 1272, 51 L.Ed.2d 496 (1977); Turner v. Fouche, 396 U.S. 346, 90 S.Ct. 532. 24 L Ed.2d 532 (1970): Gibson v. Zant. 705 F.2d 1543 (11th Cir.1963). This is because the discretion allowed to jury commissioners, although legitimate, could easily be used to mask conscious or unconscious racial discrimination. The Supreme Court has recognized that the presence of this sort of discretion calls for indirect methods of proof. Washington v. Dams. 425 U.S. 229, 241-42, 96 S.Ct. 2040, 2048-49. 48 LEd.2d 597 (1975); Arlington Heights t. Metropolitan Housing Corp. 429 U.S. 252, 266 n. 13, 97 S.Ct. 555, 564 n. 13. 50 LEd.2d 450 (1977).

This Court has confronted the same problem in an analogous setting. In Searcy in Williams, 656 F.2d 1003, 1008-09 (5th Cir. 1981), aff d sub nom. Hightower v. Searcy, 455 U.S. 984, 102 S.Ct. 1605, 71 L. Ed.2d 844 (1982), the court overturned a facially valid procedure for selecting school board members because the selections fell into an overwhelming pattern of racial imbalance. The decision rested in part on the discretion

10. The majority distinguishes the jury discrimination cases on tenuous grounds, stating that the disparity between the number of minority persons on the jury venire and the dumber of such persons in the population is an "agreed disparity," while the racial influence in this case is not. If actual disparities are to be considered then the court should employ the actual (and overwhelming) eleven-to-one differential between white victim cases and black victim cases. The percentage figures presented by the Baldus Study are really more reliable than "actual" disparities because they control for possible non-racial factors.

inherent in the selection process: "The challenged application of the statute often involves discretion or subjective criteria utilized at a crucial point in the decision-making process."

The same concerns at work in the jury discrimination context operate with equal force in the death penalty context. The prosecutor has considerable discretion and the jury has bounded but irreducible discretion. Defendants cannot realistically hope to find direct evidence of discriminatory intent. This is precisely the situation envisioned in Arlington Heights, where the Court pointed out that "[s]ometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face ... evidentiary inquiry is then relatively easy 429 U.S. at 266, 97 S.Ct. at 564.

As a result, evidence of discriminatory effects presented in the Baldus Study, like evidence of racial disparities in the composition of jury pools and in other contexts. excludes every reasonable inference other than discriminatory intent at work in the system. This Circuit has acknowledged on several occasions that evidence of this sort could support a constitutional challenge. Adams v. Wainuvright. 1998 1443, 1449 (11th Cir. 1983); Smith v. Balkcom, 660 F.2d 573 (5th Cir. Unit B. 1981), modified in part, 671 F.2d 858, cert. denied, 459 U.S. 582, 103 S.Ct. 181, 74 L.Ed.2d 148 (1982); Spinkellink, supra, at 614.

A petitioner need not exclude all inferences other than discriminatory intent in his or her particular case. 12 Yet the major-

- 11. United Steres v. Texas Educational Agency. 579 F.2d 910 (5th Cir 1978), cert. denied, 443 U.S. 915 99 S.C. 310e 91 LEd.2d 879 (1979), involving a segregated school system, provides another example of effects evidence as applied to an entire decision/making system.
- 12. The particularity requirement has appeared appradically in this Court's decisions prior to this time, although it was not a part of the original observation about this sort of statistical evidence in Smith v. Bulkom, supra.

ity improperly stresses this particularity requirement and interprets it so as to close a door left open by the Supreme Court.13 It would be nearly impossible to prove through evidence of a system's usual effects that intent must have been a factor in any one case; effects evidence, in this context necessarily deals with many cases at once. Every jury discrimination charge would be stillborn if the defendant had to prove by direct evidence that the jury commissioners intended to deprive him or her of the right to a jury composed of a fair cross-section of the community. Requiring proof of discrimination in a particular case is especially inappropriate with regard to an Eighth Amendment claim, for even under the majority's description of the proof necessary to sustain an Eighth Amendment challenge, race operating in a pervasive manner "in the system" will suffice.

The majority, after sowing doubts of this sort, nevertheless concedes that despite the particularity requirement, evidence of the system's effects could be strong enough to demonstrate intent and purpose. It subsequent efforts to weaken the implications to be drawn from the Baldus Study are uniformly unsuccessful.

For example, the majority takes comfort in the fact that the level of aggravation powerfully influences the sentencing decision in Georgia. Yet this fact alone does not reveal a "rational" system at work. The statistics not only show that the number of aggravating factors is a significant influence; they also point to the race of the

- 13. The dissenting opinion of Justice Powell in Stephens v. Kemp. U.S. ——, 104 S.C.: 562. 78 LEd.2d 370, 372 (1984), does not undermine the clear import of cases such as the jury discrimination cases. For one thing, a dissent from a summary order does not have the precedential weight of a fully considered opinion of the Court. For another, the Stephens dissent considered the Baldus Study as an equal protection argument only and did not address what might be necessary to prove an Eighth Amendment violation.
- 16. While I agree with Judge Anderson's observation that "the proof of metal motivation required in a death case—would be less street than that required in civil cases or in the criminal justice system generally." I find it inconsist-

victim as a factor of considerable influence. Where racial discrimination contributes to an official decision, the decision is unconstitutional even though discrimination was not the primary motive. Personnel Administrator v. Feeney, 442 U.S. 256, 279, 99 S.Ct. 2282, 2296, 60 L.Ed.2d 870 (1979).

Neither can the racial impact be explained away by the need for discretion in the administration of the death penalty or by any "presumption that the statute is operating in a constitutional manner." The discretion necessary to the administration of the death penalty does not include the discretion to consider race: the jury may consider any proper aggravating factors, but it may not consider the race of the victim as an aggravating factor. Zant v. Stephens, 462 U.S. 862, 103 S.Ct. 2733. 2741, 77 LEd.2d 235 (1983). And a statute deserves a presumption of constitutionality only where there is real uncertainty as to whether race influences its application. Evidence such as the Baldus Study, showing that the pattern of sentences can only be explained by assuming a significant ra cial influence.18 overcomes whatever presumption exists.

The majority's effort to discount the importance of the "liberation hypothesis" also fails. In support of his contention that juries were more inclined to rely on race when other factors did not militate toward one outcome or another, Dr. Baldus noted that a more pronounced racial influence appeared in cases of medium aggravation

ent with his acceptance of the majority outcome. The "exacting" constitutional supervission over the death penalty established by the Supreme Court compols the conclusion that discriminatory effects can support an Eighth Amendment challenge. Furthermore, the majority's evaluation of the evidence in this case is, if anything, more strict than in other contexts. See note 10, supra.

15. The racial influence operates in the average case and is therefore probably at work in any single case. The majority misconstrues the nature of regression analysis when it says that the coefficient of the race-of-the victim factor represents the percentage of cases in which race could have been a factor. That operficient represents the influence of race across all the cases.

(20 percent) than in all cases combined (6 percent). The majority states that racial impact in a subset of cases cannot provide the basis for a systemwide challenge. However, there is absolutely no justification for such a claim. The fact that a system mishandles a sizeable subset of cases is persuasive evidence that the entire system operates improperly. Cf. Connecticut v. Teal, 457 U.S. 440, 102 S.Ct. 2525, 73 LEd 2d 130 (1984) (written test discriminates against some employees); Lewis v. City of New Orleans, 415 U.S. 130, 94 S.CL 970, 39 L.Ed.2d 214 (1974) (statute infringing on First Amendment interests in some cases). A system can be applied arbitrarily and capriciously even if it resolves the obvious cases in a rational manner. Admittedby, the lack of a precise definition of medium aggravation cases could lead to either an overstatement or understatement of the racial influence. Accepting, however, that the racial factor is accentuated to some degree in the middle range of cases,16 the evidence of racial impact must be taken all the more seriously.

Finally, the majority places undue reliance on several recent Supreme Court cases. It argues that Ford v. Strickland. \_ U.S. \_\_\_ 104 S.Ct 3498, 82 L.Ed.2d 911 (1984), Adams t. Wainumight - U.S. \_\_\_\_\_ 104 S.Ct. 2183. 80 L.Ed.2d 809 (1984). and Sullivan v. Wainumght, - U.S. \_\_\_\_\_, 104 S.Ct. 450, 78 L.Ed.2d 210 (1983), support its conclusion that the Baldus Study does not make a strong enough showing of effects to justify an inference of intent. But to the extent that these cases offer any guidance at all regarding the legal standards applicable to these studies.17 it is clear that the Court considered the validity of the studies rather than their sufficiency. In Sullivan, the Supreme Court refused to stay the execution simply because it agreed with the decision of this Court, a decision based on the validity of the study alone. Sullivan n. Wainwright, 721 F.2d 316 (11th Cir.1983) (citing prior cases rejecting statistical evidence because it did not account for non-racial explanations of the effects). As the majority mentions, the methodology of the Baldus Study easily surpasses that of the earlier studies involved in those cases.

Thus, the Baldus Study offers a convincing explanation of the disproportionate of fects of Georgia's death penalty system. It shows a clear pattern of sentencing that can only be explained in terms of race, and it does so in a context where direct evidence of intent is practically impossible to obtain. It strains the imagination to believe that the significant influence on sentencing left unexplained by 230 alternative factors is random rather than racial, especially in a state with an established history of racial discrimination. Turner r. Fouche, supra: Chapman v. King. 154 F.2d 460 (5th Cir.), cert. denied, 327 U.S. 900, 66 S.Ct 905, 90 L.Ed. 1025 (1946) The petitioner has certainly presented evidence of intentional racial discrimination at work in the Georgia system. Georgia has within the meaning of the Eighth Amendment applied its statute arbitrarily and capriciously.

# III. THE VALIDITY OF THE BALDUS STUDY

The majority does not purport to reach the issue of whether the Baldus Study reliably proves what it claims to prove. However, the majority does state that the district court's findings regarding the validity

nounced statistic in the Baldus Study: a ruling of insufficiency based on that one indicator would not be controlling here.

The majority apparently ignores its commitment to accept the validity of the Baldus Study when it questions the definition of "medium aggravation cases" used by Dr Baldus.

<sup>17.</sup> The opinion in ford mentioned this issue in a single sentence: the order in Adams was not accompanied by any written opinion at all None of the three treated this argument as a possible Eignth Amenitment claim. Finally, the "death odds multipier" is not the most pro-

of the study might foreclose habeas relief on this issue. Moreover, the majority opinion in several instances questions the validity of the study while claiming to be interested in its sufficiency alone. I therefore will summarize some of the reasons that the district court was clearly erroneous in finding the Baldus Study invalid.

The district court fell victim as misconception that distorted its factual findings. The Court pointed out a goodly number of imperfections in the study but rarely went ahead to determine the significance of those imperfections. A court may not simply point to flaws in a statistical analysis and conclude that it is completely unreliable or fails to prove what it was intended to prove. Rather, the Court must explain why the imperfection makes the study less capable of proving the proposition that it was meant to support. Eastland v. Tennessee Valley Authority, 704 F.2d 613 (11th Cir. 1983), cert denied. - U.S. -104 S.Ct. 1415, 79 L.Ed.2d 741 (1984).

Several of the imperfections noted by the district court were not legally significant because of their minimal effect. Many of the errors in the data base match this description. For instance, the "mismatches" in data entered once for cases in the Procedural Reform Study and again for the same cases in the Charging and Sentencing Study were scientifically negligible. The district court relied on the data that changed from one study to the next in concluding that the coders were allowed

- The remaining errors affected little more than one percent of the data in any of the models. Data errors of less than 10 or 12% generally do not threaten the validity of a model.
- 20. Dr. Baldus used an "imputation method." whereby the race of the victim was assumed to be the same as the race of the defendant. Given the predominance of murders where the victim and defendant were of the same race, this method was a reasonable way of estimating the number of victims of each race. If further reduced the significance of this missing data.
- 23. The district court, in assessing the weight to be accorded this omission, assumed that Dr. Baldus was completely unsuccessful in predict

too much discretion. But most of the alleged "mismatches" resulted from intentional improvements in the coding techniques and the remaining errors <sup>19</sup> were not large enough to affect the results.

The data missing in some cases was also a matter of concern for the district court. The small effects of the missing data leave much of that concern unfounded. The race of the victim was uncertain in 6% of the cases at most "; penalty trial information was unavailable in the same percentage of cases.21 The relatively small amount of missing data, combined with the large number of variables used in several of the models, should have led the court to rely on the study. Statistical analyses have never been held to a standard of perfection or near perfection in order for courts to treat them as competent evidence. Trout v. Lehman, 702 F.2d 1094, 1101-02 (D.C.Cir. 1983). Minor problems are inevitable in a study of this scope and complexity: the stringent standards used by the district court would spell the loss of most statistical evidence.

Other imperfections in the study were not significant because there was no reason to believe that the problem would work systematically to expand the size of the race-of-the-victim factor rather than to contract it or leave it unchanged. The multi-collinearity problem is a problem of notable proportions that nonetheless did not increase the size of the race-of-the-victim factor. Ideally the independent variables in

ing how many of the cases led to penalty trials. Since the prediction was based on discernible trends in the rest of the cases, the district court was clearly erroneous to give no weight to the prediction.

22. The treatment of the coding conventions provides another example. The district court crucial Dr. Baldus for treating "U" codes (indicating uncertainty as to whether a factor was present in a case) as being beyond the knowledge of the jun, and prosecutor ("absent") rather than assuming that the decisionmakers knew about the factor ("present"). Baldus contended that, if the extensive records available on each case did not disclose the presence of a factor chances were good that the decisionmakers did not know of its presence, either. Dr. Berk testi-

a regression analysis should not be related to one another. If one independent variable merely serves as a proxy for another, the model suffers from "multicollinearity." That condition could either reduce the statistical significance of the variables or distort their relationships to one another. Of course, to the extent that multicollinearity reduces statistical significance it suggests that the racial influence would be even more certain if the multicollinearity had not artificially depressed the variable's statistical significance. As for the distortions in the relationships between the variables, experts for the petitioner explained that multicollinearity tends to dampen the racial effect rather than enhance it."

The district court did not fail in every instance to analyze the significance of the problems. Yet when it did reach this issue. the court at times appeared to misunderstand the nature of this study or of regression analysis generally. In several related criticisms, it found that any of the models accounting for less than 230 independent variables were completely worthless (580 F.Supp. at 361), that the most complete models were unable to capture every nuance of every case (580 F.Supp. at 356. 371), and that the models were not sufficiently predictive to be relied upon in light of their low R 2 value (580 F.Supp. at 361).24 The majority implicitly questions the validity of the Baldus Study on several occasions when it adopts the first two of these criti-

fied that the National Academy of Sciences had considered this same issue and had recommended the course taken by Dr. Baidus. Dr. Katt, the experi witness for the state, suggested removing the cases with the U codes from the study altogether. The district court's suggestion, when, that the U codes be treated as present, appears to be groundless and clearly removes.

Baidus laier demonstrated that the U codes did not affect the race-of-the-victim factor by recoding all the items coded with a U and treating them as present. Each of the tests showed no significant reduction in the racial variable. The district court rejected this demonstration because it was not carried out using the largest

 The district court rejected this expert testimony, not because of any rebuttal testimony, but because it allegedly conflicted with the petition.

cisms. 3 A proper understanding of statistical methods shows, however, that these are not serious shortcomings in the Baldus Study.

The district court mistrusted smaller models because it placed too much weight on one of the several complementary goals of statistical analysis. Dr. Baldus testified that in his opinion the 39-variable model was the best among the many models he produced. The district court assumed somewhat mechanistically that the more independent variables encompassed by a model, the better able it was to estimate the proper influence of non-racial factors. But in statistical models, bigger is not always better. After a certain point, additional independent variables become correlated with variables already being considered and distort or suppress their influence. The most accurate models strike an at propriate balance between the risk of omitting a significant factor and the risk of multicollinearity. Hence, the district court erred in rejecting all but the largest models.

The other two criticisms mentioned earlier spring from a single source—the misinterpretation of the R<sup>2</sup> measurement. The failure of the models to capture every nuance of every case was an inevitable but harmless failure. Regression analysis accounts for this limitation with an R<sup>2</sup> measurement. As a result, it does not matter

er's other theory that multicollinearity affects statistical significance. 580 F-Supp at 364. The two theories are not inconsistent, for nither Dr. Baldus nor Dr. Woodworth denied that multicollinearity might have multiple effects. The two theories each analyze one possible effect. Therefore, the district court rejected this testimony on improper grounds.

- 24. The R<sup>2</sup> measurement represents the influence of random factors unique to each case that could not be captured by addition of another independent variable. As R<sup>2</sup> approaches a value of 1.0, one can be more sure that the more pendent variables already identified are acruirate and that no significant influences are manquerading as random influences.
- 25. Sec. e.g. pp 806, 899
- 26. Ser fuornote 24

that a study fails to consider every nuance of every case because random factors (factors that influence the outcome in a sporadic and unsystematic way) do not impugn the reliability of the systemwide factors already identified, including race of the vicin. Failure to consider extra factors becomes a problem only where they operate throughout the system, that is, where R 2 is inappropriately low.

The district court did find that the R 2 of the 230-variable study, which was nearly 48, was too low." But an R2 of that size is not inappropriately low in every context." The R 2 measures random factors unique to each case: in areas where such factors are especially likely to occur. one would expect a low R 2. As the experts, the district court and the majority have pointed out, no two death penalty cases can be said to be exactly alike, and it is especially unlikely for a statistical study to capture every influence on a sentence. In light of the random factors at work in the death penalty context, the district court erred in finding the R2 of all the Baidus Study models too low."

Errors of this sort appear elsewhere in the district court opinion and leave me with the definite and firm conviction that the basis for the district court's ruling on the invalidity of the study was clearly erroneous. United States v. Gypsum Co., 333 U.S. 364, 395, 68 S.Ct. 525, 541, 92 L.Ed. 746 (1948). This statistical analysis, while imperfect, is sufficiently complete and reliable to serve as competent evidence to guide the court. Accordingly, I would reverse the judgment of the district court

27. It hased that finding on the fact that a model with tin R? less than 5."does not predict the outcome in half of the cases." This is an inaccurate statement, for an R? actually represents the percentage of the original 11-to-1 differential explained by all the independent variables combined. A model with an R? of less than 5 would not necessarily fail to predict the outcome in half the cases because the model improves upon pure chance as a way of correctly predicting an outcome. For dichotomous outcomet (i.e. the death penalty is imposed or it is not), random predictions could succeed half the time.

with regard to the validity of the Baldus Study. I would also reverse that court's determination that an Eighth Amendment claim is not available to the petitioner. He is entitled to relief on this claim.

#### IV. OTHER ISSUES

I concur in the opinion of the court with regard to the death-oriented jury claim and in the result reached by the court on the ineffective assistance of counsel claim. I must dissent, however, on the two remaining issues in the case. I disagree with the holding on the Giglio issue, on the basis of the findings and conclusions of the district court and the dissenting opinion of Chief Judge Godbold. As for the Sandstrom claim, I would hold that the instruction was erroneous and that the error was not harmless.

It is by no means certain that an error of this sort can be harmless. See Connecticut v. Johnson, 460 U.S. 73, 103 S.Ct. 969. 74 L.Ed.2d 823 (1983). Even if an error could be harmless, the fact that McCleskey relied on an alibi defense does not mean that intent was "not at issue" in the case. Any element of a crime can be at issue whether or not the defendant presents evidence that disputes the prosecution's case on that point. The jury could find that the prosecution had failed to dispel all reasonable doubts with regard to intent even though the defendant did not specifically make such an argument. Intent is at issue wherever there is evidence to support a reasonable doubt in the mind of a reasonable juror as to the existence of emminal intent. See Lamb v. Jermigan, 683 F.2d

- 28. Willims v. University of Houston, 654 F.2d 383, 405 (5th Cr 1981), is not to the contrary. That court stated only that it could not know whether an R 4 of 52 or 53 percent would be inappropriately low in that context since the parties had not made any argument on the issue.
- 29. Furthermore, an expert for the petitioner of fered the unchallenged opinion that the R2 measurements in studies of dichotomous outcomes are understated by as much as 50%, placing the R2 values of the Baldus Study models somewhere between 7 and 9.

1332, 1342-43 (11th Cir.1982) ("no reasonable juror could have determined ... that appellant acted out of provocation or self-defense," therefore error was harmless).

The majority states that the raising of an alibi defense does not automatically render a Sandstrom violation harmless. It concludes, however, that the raising of a nonparticipation defense coupled with "overwhelming evidence of an intentional killing" will lead to a finding of harmless error. The majority's position is indistinguishable from a finding of harmless error based solely on overwhelming evidence.30 Since a defendant normally may not relieve the jury of its responsibility to make factual findings regarding every element of an offense, the only way for intent to be "not at issue" in a murder trial is if the evidence presented by either side provides no possible issue of fact with regard to intent. Thus, McCleskey's chosen defense in this case should not obscure the sole basis for the disagreement between the majority and myself: the reasonable inferences that could be drawn from the circumstances of the killing. I cannot agree with the majority that no juror, based on any reasonable interpretation of the facts, could have had a reasonable doubt regarding intent.

Several factors in this case bear on the issue of intent. The shooting did not occur at point-biank range. Furthermore, the officer was moving at the time of the shooting. On the basis of these facts and other circumstances of the shooting, a juror could have had a reasonable doubt as to whether the person firing the weapon intended to kill. While the majority dismisses this possibility as "mere speculation." the law requires an appellate court to speculate about what a reasonable juror could

30. Indeed, the entire harmless error analysis employed by the court may be based on a faise dichotomy between "overwhelming endence" and elements "not at issue." Wherever intent is an element of a crime, it can only be removed as an issue by overwhelming evidence. The observation by the plurality in Contacticut violation, supra, that a defendant may in some cases "admit" an issue, should only apply where the evidence allows only one conclusion. To allow an admission to take place in the face of

have concluded. Sandstrom v. Montana. 442 U.S. 510, 99 S.Ct. 2450, 61 LEd.2d 39 (1979); United States v. Bell. 678 F.2d 547, 549 (5th Cir. Unit B 1982) (en banc), aff'd on other grounds, 462 U.S. 356, 103 S.Ct. 2398, 76 LEd.2d 638 (1983). Therefore, the judgment of the district court should be reversed on this ground, as well.

HATCHETT. Circuit Judge, dissenting in part, and concurring in part.

In this case, the Georgia system of imposing the death penalty is shown to be unconstitutional. Although the Georgia death penalty statutory scheme was held constitutional "on its face" in Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976), application of the scheme produces death sentences explainable only on the basis of the race of the defendant and the race of the victim.

I write to state clearly and simply, without the jargon of the statisticians, the resuits produced by the application of the Georgia statutory death penalty scheme, as shown by the Baidus Study.

The Baidus Study is valid. The study was designed to answer the questions when, if ever, and how much, if at all, race is a factor in the decision to impose the death penalty in Georgia. The study gives the answers. In Georgia, when the defendant is black and the victim of murder is white, a 6 percent greater chance exists that the defendant will receive the death penalty solely because the victim is white This 6 percent disparity is present throughout the total range of death-sentenced black defendants in Georgia. While the 6 percent is troublesome, it is the disparity in When the mid-range on which I focus

evidence to the contrary improperly infringes on the jury's duty to consider all relevant extended

 Although I concur with the majority opinion on the ineffective assistance of counsel and death-oriented jury issues. I write separately to express my thoughts on the Baldus Study. I also join Chief Judge Gudboids dissent, as to the Giglin issue, and Judge Johnson's dissent. cases are considered which fall in the midrange, between less serious and very serious aggravating circumstances, where the victim is white, the black defendant has a 20 percent greater chance of receiving the death penalty because the victim is white, rather than black. This is intolerable; it is in this middle range of cases that the decision on the proper sentence is most difficult and imposition of the death penalty most questionable.

The disparity shown by the study arises from a variety of statistical analyses made by Dr. Baldus and his colleagues. First, Baidus tried to determine the effect of race of the victim in 594 cases (PRS study) comprising all persons convicted of murder during a particular period. To obtain better results, consistent with techniques approved by the National Academy of Sciences, Baldus identified 2,500 cases in which persons were indicted for murder during a particular period and studied closely 1.066 of those cases. He identified 500 factors, bits of information, about the defendant, the crime, and other circumstances surrounding each case which he thought had some impact on a death sentence determination. Additionally, he focused on 230 of these factors which he thought most reflected the relevant considerations in a death penalty decision. Through this 230-factor model, the study proved that black defendants indicted and convicted for murder of a white victim begin the penalty stage of trial with a significantly greater probability of receiving the death penalty, solely because the victim is white

Baldus also observed thirty-nine factors, including information on aggravating circumstances, which match the circumstances in this case. This focused study of the aggravating circumstances in the midrange of severity indicated that "white tim crimes were shown to be 20 percent more likely to result in a death penalty sentence than equally aggravated black victum crimes." Majority at 596.

We must not lose sight of the fact that the 39-factor model considers information relevant to the impact of the decisions being made by law enforcement officers. prosecutors, judges, and juries in the decision to impose the death penalty. The majority suggests that if such a disparity resulted from an identifiable actor or agency in the prosecution and sentencing process, the present 20 percent racial disparity could be great enough to declare the Georgia system unconstitutional under the eighth amendment. Because this disparity is not considered great enough to satisfy the majority, or because no identification of an actor or agency can be made with precision, the majority holds that the statutory scheme is approved by the Constitution. Identified or unidentified, the result of the unconstitutional ingredient of race, at a significant level in the system, is the same on the black defendant. The inability to identify the actor or agency has little to do with the constitutionality of the system.

The 20 percent greater chance in the mid-range cases, because the defendant is black and the whitm is white), produces a disparity that is too high. The study demonstrates that the 20 percent disparity, in the real world, means that one-third of the black defendants (with white victims) in the mid-range cases will be affected by the race factor in receiving the death penalty. Race should not be allowed to take a significant role in the decision to impose the death penalty.

The Supreme Court has reminded us on more than one occasion that "if a state wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty" God/rey v. Georgia. 446 U.S. 420, 428, 100 S.Ct. 1759, 1764, 64 L.Ed.2d 398 (1980). A statute that intentionally or unintentionally allows for such racial effects is unconstitutional under the eighth amendment. Because the majority holds otherwise. I dissent.

of studies on discrimination in application of the Florida death senalty scheme should be

Nothing in the majority opinion regarding the validity, impact, or constitutional significance

and concurring in part

We are challenged to determine how much racial discrimination, if any, is tolerable in the imposition of the death penalty. Although I also join in Judge Johnson's dissent, this dissent is directed to the maiority's erroneous conclusion that the evidence in this case does not establish a prima facie Fourteenth Amendment violation.

#### The Study

The Baldus study, which covers the period 1974 to 1979, is a detailed study of over 2.400 homicide cases. From these homicides, 128 persons received the death penalty. Two types of racial disparity are established-one based on the race of the victim and one based on the race of the defendant If the victim is white, a defendant is more likely to receive the death penalty. If the defendant is black, he is more likely to receive the death penalty. One can only conclude that in the operation of this sys-

CLARK, Circuit Judge, dissenting in part tem the life of a white is dearer, the life of a black cheaper.

> Before looking at a few of the figures, a perspective is necessary. Race is a factor in the system only where there is room for discretion, that is, where the decision maker has a viable choice. In the large number of cases, race has no effect. These are cases where the facts are so mitigated the death penalty is not even considered as a possible punishment. At the other end of the spectrum are the tremendously aggravated murder cases where the defendant will very probably receive the death penalty, regardless of his race or the race of the victim. In between is the mid-range of cases where there is an approximately 20% racial disparity.

> The Baldus study was designed to determine whether like situated cases are treated similarly. As a starting point, an unanalyzed arithmetic comparison of all of the cases reflected the following:

	Death Sentencing I Victum Racial					
A	В	С	D			
Black Defendant	White Defendant	Black Victim	White Defendant. Black Victim			
.2	.08	.01	.03			
(50/228)	(58/745)	(18/1438)	(2/64)			
(108/973)		013 (20 1502)				

These figures show a gross disparate racial the victim was black. Similarly, only 8% of impact-that where the victim was white there were 11% death sentences, compared to only 1.3 percent death sentences when

white defendants compared to 220 of black defendants received the death penalty when the victim was white. The Supreme

construed to imply that the United States Supreme Court has squarely passed on the Florida studies. Neither the Supreme Court nor the Eleventh Circuit has passed on the Florida studies, on a fully developed record (as in this case), under fourteenth and eighth amendment challenges. oriented jury issues. I write separately to express my thoughts on the Baidus Siudy. I also join Chief Judge Godbold's dissent and Judge Johnson's dissent.

1. DB Exhibit e3.

<sup>\*</sup> Although I concur with the majority opinion on the ineffective assistance of counsel and death

Court has found similar gross disparities to be sufficient proof of discrimination to support a Fourteenth Amendment violation.

The Baldus study undertook to determine if this racial sentencing disparity was caused by considerations of race or because of other factors or both. In order to find out it was necessary to analyze and compare each of the potential death penalty cases and ascertain what relevant factors were available for consideration by the decision makers.3 There were many factors such as prior capital record, contemporaneous offense, motive, killing to avoid arrest or for hire, as well as race. The study showed that race had as much or more impact than any other single factor. See Exhibits DB 76-78, T-776-87. Stated another way, race influences the verdict just

- 2. See discussion below at Page 9.
- An individualized method of sentencing makes it possible to differentiate each particular case "in an objective, evenhanded, and substantially rational way from the many Georgia murder

as much as any one of the aggravating circumstances listed in Georgia's death penalty statute. Therefore, in the application of the statute in Georgia, race of the defendant and of the victim, when it is black/white, functions as if it were an aggravating circumstance in a discernible number of cases. See Zant v. Stephens, 462 U.S. 862, 103 S.Ct. 2733, 2747, 77 L.Ed.2d 235 (1983) (race as an aggravating circumstance would be constitutionally impermissible).

Another part of the study compared the disparities in death penalty sentencing according to race of the defendant and race of the victim and reflected the differences in the sentencing depending upon the predicted chance of death, i.e., whether the type of case was or was not one where the death penalty would be given.

cases in which the death penalty may not be imposed." Zant v. Stephens, 462 U.S. 862, 103 S.Ci. 2733, 77 L.Ed.2d 235, 251.

4. O.C.G.A. \$ 17-10-30.

DEATH SENTENCING BAYES CONTROLLING POR THE PREDICTED LIEBLIHORDS BAIL SENTENCE AND THE RACE OF THE VITTIM	~	1	(Caterinal)							2	•	
	-	Arithmetic [Minerale in Race of the	Defendant Bate (Call Call)		•	=			÷	•	2	
	=1	Death Mark Votes Case broken	Photo-				-		,	2.0		
	91	111	Black Refreshents			12/20	(2/1m)	181/00	11 12/12	11/200	E 140	32
	<b>54.</b> 0	1	Referdant Rates (Editorially			2	2		2	* 2	1	20 1
	<b>24</b> )	Accidencia Influence in Race of the	Perfembant Rates (Cal. Cally)	•		E	2	•	2	z	2	24
SPARITIES OF A 1	a	Reads seeing Rates for Where Vertice pere foredring	hines White- ber-daste (befordaste	•		E 2	11/13	2/2	2 2	67.89	# 11/5/18	
RACE OF DESIMANT D	ų,	Death Sectioning Rates for Where Versian Cases breaking	Patrodesis				E 1/10	67.30	35.00	4 5	3 62	
RACE OF IS						3 1	11/11	(4/8/h	12	********	1257 709	
	<b>«</b> 1	Perked Charte	(budhed)	-			,					

Columns A and B reflect the step progravated cases. Table 43, DB, Ex. 91.5 gression of least aggravated to most ag-

then sub-divided into the eight sub-groups in ascending order giving consideration to more serious aggravating factors and larger combinations of them as the steps progress. Tripages 877-63

<sup>5.</sup> The eight sub-groups were derived from the group of cases where the death penalty was predictably most likely based upon an analysis of the relevant factors that resulted in the vast majority of defendants receiving the death pen-alty—11e out of the total 128. This group was

923

of black defendants to white defendants when the victim is white and reflect that in Steps 1 and 2 no death penalty was given in those 41 cases. In Step 8, 45 death penalties were given in 30 cases, only two blacks and three whites escaping the death penalty-this group obviously representing the most aggravated cases. By comparing Steps 3 through 7, one can see that in each group black defendants received death penalties disproportionately to white defendants by differences of .27, .19, .15, .22, and .25. This indicates that unless the murder is so vile as to almost certainly evoke the death penalty (Step 8), blacks are approximately 20% more likely to get the death penalty.

The right side of the chart reflects how unlikely it is that any defendant, but more particularly white defendants, will receive the death penalty when the victim is black.

#### Statistics as Proof

The jury selection cases have utilized different methods of statistical analysis in determining whether a disparity is sufficient to establish a prima facie case of purposeful discrimination. Early jury selection cases, such as Swain v. Alabama, used very simple equations which primarily analyzed the difference of minorities eligible for jury duty from the actual number

- In Villajane v. Manson. 304 F.Supp. 78
  (D.Conn.1980), the court noted that four forms of analysis have been used: (1) the absolute difference test used in Swam v. Alabama, 380
  U.S. 202. 85 S.Ct. 824. 13 L.Ed.2d 759 (1965); (2) the ratio approach. (3) a test that moves away from the examination of percentages and focuses on the differences caused by underrepresentation in each jury; and (4) the matistical decision theory which was fully embraced in Castanada v. Partida, 430 U.S. at 496 it. 17, 97 S.Ct. at 1281 n. 17. See also Finkelstein, The Application of Statistical Decision Theory to the Jury Discrimination Cases, 80 Harv.L.Rev. 338 (1966).
- See Swain v. Alabama, 380 U.S. 202, 85 S.C. 824, 13 LEd.2d 759 (1965); Villajane v. Manson, 504 F. Supp. at 83.
- See Finkelstein. The Application of Statistical Decision Theory to the Jury Discrimination Cases. 30 Ham. L.Rev. 338, 363 (1966) (The Court did not reach these problems in Swein

of minorities who served on the jury to determine if a disparity amounted to a substantial underrepresentation of minority jurors. Because this simple method did not consider many variables in its equation, it was not as accurate as the complex statistical equations widely used today.

The mathematical disparities that have been accepted by the Court as adequate to establish a prima facie case of purposeful discrimination range approximately from 14% to 40%. "Whether or not greater disparities constitute prima facie evidence of discrimination depends upon the facts of each case." <sup>19</sup>

Statistical disparities in jury selection cases are not sufficiently comparable to provide a complete analogy. There are no guidelines in decided cases so in this case we have to rely on reason. We start with a sentencing procedure that has been approved by the Supreme Court.11 The object of this system, as well as any constitutionally permissible capital sentencing system, is to provide individualized treatment of those eligible for the death penalty to insure that non-relevant factors, i.e. factors that do not relate to this particular individual or the crime committed, play no part in deciding who does and who does not receive the death penalty.12 The facts dis-

because of its inability to assess the significance of statistical data without mathematical tools.").

- Castaneda v. Partida, 430 U.S. at 495-96, 97 S.Ct. at 1280-82 (disparity of 40%); Turner v. Fouche, 396 U.S. 346, 90 S.Ct. 532, 24 LEd.2d 567 (1970) (disparity of 129%); Whittas v. Georgia, 385 U.S. 545, 87 S.Ct. 643, 17 LEd.2d 599 (1967) (disparity of 18%); Simi v. Georgia, 389 U.S. 404, 88 S.Ct. 523, 19 LEd.2d 634 (1967) (disparity of 19.7%); Jones v. Georgia, 389 U.S. 24, 88 S.Ct. 4, 19 LEd.2d 25 (1967) (disparity of 14.7%). These figures result from the computation used in Swear.
- 18. United States as rel Barksdale v. Blackburn, 639 F.2d 1115, 1122 (5th Cir.1981) (en banc).
- 11. Gregs v. Georgia, 428 U.S. 153, 96 S.Ci. 2909 49 LEd 2d 859 (1976):
- 12. The sentencing body's decision must be focused on the "particularized nature of the crime and the particularized characteristics of the in-

closed by the Baldus study, some of which have been previously discussed, demonstrate that there is sufficient disparate treatment of blacks to establish a prima facie case of discrimination.

This discrimination, when coupled with the historical facts, demonstrate a prima facie Fourteenth Amendment violation of the Equal Protection Clause. It is that discrimination against which the Equal Protection Clause stands to protect. The majority, however, fails to give full reach to our Constitution. While one has to acknowledge the existence of prejudice in our society, one cannot and does not accept its application in certain contexts. This is nowhere more true than in the administration of criminal justice in capital cases.

# The Fourteenth Amendment and Equal Protection

"A showing of intent has long been required in all types of equal protection cases charging racial discrimination." <sup>13</sup> The Court has required proof of intent before it will strictly scrutinize the actions of a legislature or any official entity. <sup>14</sup> In this respect, the intent rule is a tool of self-restraint that serves the purpose of limiting judicial review and policymaking. <sup>15</sup>

The intent test is not a monolithic structure. As with all legal tests, its focus will

dividual defendant." 428 U.S. at 206, 96 S.Ct. at 2940. See also Lockett v. Ohio. 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) ("the need for treating each defendant in a capital case with degree of respect due the uniqueness of the individual is far more important than in non-capital cases." 438 U.S. at 605, 98 S.Ct. at 2965): Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 does focus on a characteristic of the particular defendant, albeit an impermissible one. See infra. p. 3.

- 13. Rogers v. Lodge, 458 U.S. 613, 102 S.Ct. 3272, 3276, 73 L.Ed.2d 1012 (1982).
- 34. Id. at n. 5 ("Purposeful racial discrimination invokes the strictest scrutiny of adverse differential treatment. Absent such purpose, differential impact is subject only to the test of rationality."); see also Sellers, The Impact of Intent on Equal Protection Iursprudence, 8a Dick L.Rev. 363, 377 (1979) ("the rule of intent profoundly affects the Supreme Court's posture toward equal protection claims.").

vary with the legal context in which it is applied. Because of the variety of situations in which discrimination can occur, the method of proving intent is the critical focus. The majority, by failing to recognize this, misconceives the meaning of intent in the context of equal protection jurisprudence.

Intent may be proven circumstantially by utilizing a variety of objective factors and can be inferred from the totality of the relevant facts. The factors most appropriate in this case are: (1) the presence of historical discrimination; and (2) the impact, as shown by the Baldus study, that the capital sentencing law has on a suspect class. The Supreme Court has indicated that:

Evidence of historical discrimination is relevant to drawing an inference of purposeful discrimination, particularly where the evidence shows that discriminatory practices were commonly utilized, that they were abandoned when enjoined by courts or made illegal by civil rights legislation, and that they were replaced by laws and practices which, though neutral on their face, serve to maintain the status quo.<sup>18</sup>

Evidence of disparate impact may demonstrate that an unconstitutional purpose

- 15. The intent rule "serves a countervailing concern of limiting judicial policy making. Washington v. Devu can be understood as a reflection of the Court's own sense of institutional self-restraint—a limitation on the power of judicial review that avoids having the Court sit as a super legislature. "Note. Section 1981: Ducerminator: Purpose or Disproportionate Impact. 30 ColumiLR, 137, 160—61 (1980), see also Washington v. Devu. 426 U.S. 229, 247—48, 84 S.Ct. 2040, 2051, 48 L.Ed.26 (97) (1974).
- See Village of Arlington Hoights v. Metropolitan Housing Development Corp., 429 U.S. 252 266, 97 S.Ct. 535, 564, 50 L.Ed.2d 450 (1977).
- 17. Id Ser also Rogers v Lodge: 102 S.C. at 3280
- 18. Rogers v Lodge, 102 S.Ct. at 3280

may continue to be at work, especially where the discrimination is not explainable on non-racial grounds. Table 43, supra p. 4, the table and the accompanying evidence leave unexplained the 20% racial disparity where the defendant is black and the victim is white and the murders occurred under very similar circumstances.

Although the Court has rarely found the existence of intent where disproportionate impact is the only proof, it has, for example, relaxed the standard of proof in jury selection cases because of the "nature" of the task involved in the selection of jurors." Thus, to show an equal protection violation in the jury selection cases, a defendant must prove that "the procedure employed resulted in a substantial underrepresentation of his race or of the identifiable group to which he belongs." 21 The ides behind this method is simple. As the Court pointed out, "filf a disparity is sufficiently large, then it is unlikely that it is due solely to chance or accident, and, in the absence of evidence to the contrary, one must conclude that racial or other class-related factors entered into the selection process." Donce there is a showing of a substantial underrepresentation of the de-

 In Washington v. Devis, 426 U.S. at 242 %
 S.C. at 2049, the Court stated: "It is also not infrequently mue that the discriminatory impact

may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on nonracial grounds." See also Personnel Administrator of Mass. » Feeny, 442 U.S. 25e. 99 S.C. 2292, 229e. n. 24, 80 L.Ed. 2d 170 (1979) (Washington and Arlington recognize that when a neutral law has a disparate impact upon a group that has historically been a victim of discrimination, an unconstitutional purpose may still be at work).

28. Village of Artingron Heights v. Metropolisan Housing Development Corp., 429 U.S. at 267 n. 13, 97 S.Ct. at 564 n. 13 ("Because of the nature of the jury-selection task however, we have permitted a finding of constitutional violation even when the statistical pattern does not approach the extremes of Yiek Wo [118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220] or Gomulion [364 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d 110]"): see also international Bro. of Taumsters v. United States. 431 U.S. 324, 339, 97 S.Ct. 1843, 1856, 52 L.Ed.2d 396 (1977) ("We have repeatedly approved the use of statistical proof—to estab-

fendant's group, a prima facie case of diseriminatory intent or purpose is established and the state acquires the burden of rebutting the case.<sup>33</sup>

In many respects the imposition of the death penalty is similar to the selection of jurors in that both processes are discretionary in nature, vulnerable to the bias of the decision maker, and susceptible to a rigorous statistical analysis.<sup>34</sup>

The Court has refrained from relaxing the standard of proof where the case does not involve the selection of jurors because of its policy of: (1) deferring to the reasonable acts of administrators and executives; and (2) preventing the questioning of tax, welfare, public service, regulatory, and licensing statutes where disparate impact is the only proof." However, utilizing the standards of proof in the jury selection cases to establish intent in this case will not contravene this policy because: (1) deference is not warranted where the penalty is grave and less severe alternatives are available: and (2) the court did not contemplate capital sentencing statutes when it established this policy. Thus, statistics alone could be utilized to prove intent in this case. But historical background is

lish a prima facie case of racial discrimination in jury selection cases.").

- 21. Castanada v. Fernás, 430 U.S. 482, 484, 97 S.Ct. 1272, 1280, 51 L.Ed.2d 498 (1977).
- 22. Mars. 13.
- 23. M at 495, 97 S.Ct. at 1250
- 24. James Logal Theones for Attacking Racial Duplinity in Sensencing, 18 Crim.L.Rep. 101. 110-11 (1982) ("In many respects sentencing as similar to the selections of jury panels as in Castanada."). The majority opinion notes that the Baldus study ignores quantitative difference in cases: "locks, age, personality, education, profession, job. clothes, demeanor, and remorae..." Majority opinion at 42. However, it is these differences that often are used to mask, either intentionally or unintentionally, racial prejudice.
- Sar Washington v. Devis, 426 U.S. at 248, 96
   S.Ct. at 2051, Note: Section 1981: Discrimination: Purpose or Dispreparationals Impact, 80 Colum. L.R. 127, 146-47 (1980).

also relevant and supports the statistical conclusions.

"Discrimination on the basis of race, odious in all aspects, is especially pernicious in
the administration of Justice." It is the
duty of the courts to see to it that throughout the procedure for bringing a person to
justice, he shall enjoy "the protection which
the Constitution guarantees." In an imperfect society, one has to admit that it is
impossible to guarantee that the administrators of justice, both judges and jurors,
will successfully wear racial blinders in every case." However, the risk of prejudice
must be minimized and where clearly
present eradicated.

Discrimination against minorities in the criminal justice system is well documented. This is not to say that progress has

- 26. Rose v. Minchell, 443 U.S. 545, 556, 99 S.CL 2993, 61 LEd.2d 739 (1979).
- 27. Rose, mayore, 443 U.S. at 557, 99 S.Ct. at 3000.
- 28. As Robespierre consended almost 200 years

Even if you imagine the most perfect judicial system, even if you find the most upright and the most enlightened judges, you will still have to allow place for error or prejudice. Robespierve (G. Rude ed. 1967).

29. See, a.g., Johnson v. Virginia. 173 U.S. 61, 83 S.C.: 1053. 10 LEd.2d 195 (1963) (invalidating segregated seating in courtrooms). Hamilion v. Alabama. 376 U.S. 650, 86 S.C.: 982, 11 LEd.2d 970 (1964) (conviction reversed when black defendant was racially demeaned on cross-examination); Devis v. Missurippi, 394 U.S. 721, 89 S.C.: 1394, 22 LEd.2d 676 (1969) (mass finger-printing of young blacks in search of rape suspect overturned). See also Rose v. Mischell suppet (racial discrimination in grand jury selection); Rogers v. Briton. 676 F.Supp. 1036 (ED. Ark. 1979). A very recent and poignant example of racial discrimination in the criminal justice system can be found in the case of Bailey v. Vining, unpublished order, civ. act. no. 76–190 (M.D.Ga. 1978). In Bailey, the court declared the jury selection system in Pulnam County, Georgia to be unconstitutional. The Office of the S. liction sent the jury commissioners a memo demonstrating how they could underrepresent blacks and women in traverse and grand juries but avoid a prima facie case of discrimination because the percentage disparity would still be within the parameters of Supreme Court and Fifth Circuit case law. See noies 7-d supra and relevant text. The result was that a limited

not been made, but as the Supreme Court in 1979 acknowledged.

we also cannot deny that, 114 years after the close of the War between the States and nearly 100 years after Strauder (100 U.S. 303, 25 L.Ed. 664) racial and other forms of discrimination still remain a fact of life, in the administration of justice as in our society as a whole. Perhaps today that discrimination takes a form more subtle than before. But it is no less real or pernicious.<sup>38</sup>

If discrimination is especially pernicious in the administration of justice, it is nowhere more sinister and abhorrent than when it plays a part in the decision to impose society's ultimate sanction, the penalty of death. It is also a tragic fact that this discrimination is very much a part of the country's experience with the death penalty. Again and as the majority

number of blacks were handpicked by the jury commissioners for service.

- 30. Rose mayor, 443 U.S. at 558-59, 99 S.Ct. at 3001.
- Sat. e.g., Furman v. Georgia, 408 U.S. 238, 92
   S.C., 2726, 33 L.Ed.2d 346 (1972) (see expectally the opinions of Douglas, J., concurring, at 249–252, 92 S.C. at 2731–2733; Stewart, J., concurring, at at 309–310, 92 S.C. at 2762; Marshall, J., concurring, at at 364–365, 92 S.C. at 2790; Burger, C.J., dissenting, at at 389–390 n. 12, 92 S.C. at 2803–2804 n. 12; Powell, J., dissenting, at at 449, 92 S.C. at 2833).
- 32. This historical discrimination in the death penalty was pointed out by Justice Marshall in his concurring opinion in Furman, supra. 408 U.S. at 364-65, 92 S.Ct. at 2790, "Lindeed a lioux at the bare matistics regarding executions is enough to betray much of the discrimination." M. See also footnote 32 for other opinions in Furman discussing racial discrimination and the death penalty. For example, between 1930 and 1980, 3863 persons were executed in the United States. 54% of those were blacks or members of minority groups. Of the 455 men executed for rape. 89.5% were black or minorities. Sarah T. Dike, Capital Punuhment in the United States, p. 43 (1982). Of the 2,307 period executed in the South during that time period, 1639 were black. During the same fifty-year period in Georgia, of the 369 people executed, 298 were black. Fifty-eight blacks were executed for rape as opposed to only three whites. Six blacks were executed for rape as opposed to only three whites. Six blacks were executed for armes robber, while no whites were. Hugh A. Bedau, ed. The Death Penalty in America (3rd ed. 1982).

points out, the new post-Furman statutes factor in the decision whether to impose have improved the situation but the Baidus study shows that race is still a very real factor in capital cases in Georgia. Some of this is conscious discrimination, some of it unconscious, but it is nonetheless real and it is important that we at least admit that discrimination is present.

Finally, the state of Georgia also has no compelling interest to justify a death penalty system that discriminates on the basis of race. Hypothetically, if a racial bias reflected itself randomly in 20% of the convictions, one would not abolish the criminal justice system. Ways of ridding the system of bias would be sought but absent a showing of bias in a given case, little else could be done. The societal imperative of maintaining a criminal justice system to apprehend, punish, and confine perpetrators of serious violations of the law would ourweigh the mandate that race or other prejudice not infiltrate the legal process. in other words, we would have to accept that we are doing the best that can be done in a system that must be administered by people, with all their conscious and unconscious biases.

However, such reasoning cannot sensibly be invoked and bias cannot be tolerated when considering the death penalty, a punishment that is unique in its finality." The evidence in this case makes a prima facie case that the death penalty in Georgia is being applied disproportionately because of race. The percentage differentials are not de minimis. To allow the death penalty under such circumstances is to approve a racial preference in the most serious decision our criminal justice system must make. This is a result our Constitution cannot tolerate.

The majority in this case does not squarely face up to this choice and its consequences. Racial prejudice/preference both conscious and unconscious is still a part of the capital decision making process in Georgia. To allow this system to stand is to concede that in a certain number of cases, the consideration of race will be a

33. See, e.g., Woodson v. North Carolina, 428 U.S.

the death penalty. The Equal Protection Clause of the Fourteenth Amendment does not allow this result. The decision of the district court on the Baldus issue should be reversed and the state required to submit evidence, if any is available, to disprove the prima facie case made by the plaintiff.



# Appendix B -

The state of the s

14.54

11.005

Opinion of the United States District Court for the Morthern District of Georgia, Atlanta Division, in McCleskey v. Sant, 580 P.Supp. 338 (M.D. Ga. 1984)

The second of the second of the second of the

care, is more than evident. (For an unsuccessful challenge to similar special laws dealing with provisional health needs. see: Benson v. Arizona State Bd. of Dental Examiners, 673 F.2d 272, 277-78 (9th Cir. 1982).

[5] Plaintiffs have chosen to rest on a roughly sketched constitutional claim based on repetitive incantations of the words "equal protection" and "due process" without making any references to any instances, aside from those justified by the special laws which were not even in effect when many of them started their dental educa-They have not even made a raw challenge to the Board's application of the statutory emteria for recognizing a dental school, a relatively simple task given the accessibility of the information needed to make a comparative analysis of the courses of study and professional recognition of the inaututions that they attended with comparable items in the School of Odontology of the Medical Sciences Campus of the University of Puerto Rico. The party opposing a motion for summary judgment cannot rest on the hope that the factual basis of broadly phrased pleadings will somehow emerge at trial without pointing to specific facts in the record which may still be is controversy and which are relevant to the outcome of the litigation. Sec. Emery " Merramack Valley Woods Products. Inc. 701 F 2d 985, 990-93 (1st Cir.1983); Manego v. Cape Cod Five Cents Sav. Bank, 692 F 2d 174, 176-77 (1st Cir.1982); Over The Road Drivers. Inc. v. Transport Insurance Co. 637 F 2d 816. 818 (1st Cir 1960).

- (6) Plaintiffs' reference to Justice Matnew's memorable phrase in Yick Won. Hopkins, 118 U.S. 356, 373, 6 S.Ct. 1064, 1072, 30 L.Ed. 220° (1886) is a typical attempt to fuel a meritless cause of action with a general principle of constitutional law. That case and this one depend upon an entirely different state of facts. There, the appellant, Yick Wo, was deprived of a means of making a living at the mere will of the board of supervisors of the city of
- Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to

San Francisco which refused him and 200 other Chinese subjects permission to carry on a laundry business while permitting 80 others, not Chinese subjects, to carry the same business under similar conditions The Court concluded that no reason existed for the discrimination "except hostility to the race and nationality to which the petitioners belong, and which, in the eve of the law, is not justified." Yick Wo at 373, 6 S.Ct. at 1072. Here the Board's rejection of plaintiffs' petition to take the exams is based not on an application of law with an "evil eye and an unequal hand" but on their val d authority and in the exercise of their duty to comply with the legitimate interest of the Commonwealth of Puerto Rico in requiring that those that choose this jurisdiction to practice dentistry be adequately qualified.

S-60

Plaintiffs having failed to establish even the semblance of a genuine controversy on material facts. see e.g.: Mas Marques in Digital Equipment Co., 637 F.2d 24 (1st Civ.1980), the undisputed facts before the Court compel, as a matter of law, that the complaint be dismissed. Judgment shall be entered accordingly.

SO ORDERED



Warren McCLESKEY. Petitioner.

Walter D. ZANT, Respondent, Civ. A. No. C81-2434A.

United States District Court N.D. Georgia. Atlanta Division.

Feb 1. 1984

Habeas corpus petition was filed. The District Court. Forrester, J., hold that (1)

make unjust and illegal discriminations between persons in similar circumstances, material in their rights, the denial of equal justice is this within the prohibition of the constitution. statistics on Georgia death penalty statute did not demonstrate prima facie case in support of contention that death penalty was imposed upon petitioner because of his race or because of race of victim; (2) jury instructions did not deprive defendant of due process; (3) claim that prosecutor failed to reveal existence of promise of assistance made to key witness entitled petitioner to relief; (4) defendant was not denied effective assistance of counsel; and (5) admission of evidence concerning prior crimes and convictions did not violate due process rights of petitioner.

Ordered accordingly.

# 1. Constitutional Law =211(3)

Application of a statute, neutral on its face, unevenly applied against minorities, is a violation of equal protection clause of the Fourteenth Amendment. U.S.C.A. Const. Amend. 14.

# 2. Constitutional Law = 42.2(2)

Defendant sentenced to death had standing under equal protection clause to attack death penalty sentence by contending that it was imposed on him because of race of his victim. U.S.C.A. Const.Amend. 14.

#### 3. Constitutional Law = 223

With reference to defendant's argument that he was being discriminated against on the basis of the race of his victim when death penalty was imposed, equal protection interests were not implicated in light of evidence that defendant was treated as any member of the majority. U.S.C.A. Const.Amend. 14.

#### 4. Criminal Law (\$1213.8(8))

Death penalty is not per se cruel and unusual in violation of Eighth Amendment. U.S.C.A. Const.Amend. S.

## 5. Criminal Law =1213.8(8)

Defendant sentenced to death failed to state claim that imposition of death-penalty violated Eighth Amendment U.S.C.A. Const.Amend. 8.

# 6. Constitutional Law =253.2(1)

Due process of law within meaning of Fourteenth Amendment mandates that laws operate on all alike such that an individual is not subject to arbitrary exercise of governmental power. U.S.C.A. Const. Amend. 14.

#### 7. Evidence =150

Intentional discrimination which the law requires to prove a violation of the Fourteenth Amendment cannot be shown by statistics alone. U.S.C.A. Const.Amend.

# 8. Constitutional Law #253.2(1)

Disparate impact alone is insufficient to establish violation of Fourteenth Amendment unless evidence of disparate impact is so strong that only permissible inference is one of intentional discrimination. U.S.C.A. Const.Amend. 14.

#### 9. Evidence =150

In death penalty case, any statistical analysis used in challenging the imposition of death penalty under equal protection clause must reasonably account for racially neutral variables which could have produced effect observed. U.S.C.A. Const. Amend. 14.

# 10. Evidence =150

Challenges to death penalty brought under equal protection clause requires that statistical evidence show likelihood of discriminatory treatment by decision makers who made judgments in question. US C.A. Const.Amend. 14.

## 11. Constitutional Law =223

In challenging imposition of death jamaity on basis of racial discrimination, underlying data presented must be shown to be accurate. USCA Const Amend 14

# 12. Evidence = 150

In criminal prosecution in which defendant challenges imposition of death penalty on basis of racial discrimination results of statistics should be statistically significant U.S.C.A. Const.Amend. 14

#### 13. Evidence =150

Generally, when accused challenges imposition of death penalty on basis of racial discrimination, statistical showing is considered significant if its "P" value is .05 or less, indicating that probability that result would have occurred by chance is one in 20 or less. U.S.C.A. Const.Amend. 14.

#### 14. Evidence =150

Before trial court will find that something is established based on multiple regression analysis, it must first be shown that model includes all of major variables likely to have an effect on dependent variable and it must be shown that unaccounted for effects are randomly distributed throughout the universe and are not correlated with independent variables included. U.S.C.A. Const.Amend. 14.

#### 15. Evidence €150

Three kinds of evidence may be introduced to validate regression model; direct evidence as to what factors are considered, what kinds of factors generally operate in decision-making process like that under challenge, and expert testimony concerning what factors can be expected to influence process under challenge. U.S.C.A. Const. Amend. 14.

## 16. Evidence =150

In habeas corpus proceeding in which defendant challenges imposition of death penalty on basis of racial discrimination, multiple regression analysis will be rejected as a tool if it does not show effect on people similarly situated: across-the-board disparities prove nothing. U.S.C.A. Const. Amend. 14.

### 17. Evidence =150

When imposition of death penalty is challenged on basis of racial discrimination, a regression model that ignores information central to understanding causal relationships at issue is insufficient to raise inference of discrimination. U.S.C.A. Const.Amend. 14.

#### 18. Evidence €150

When defendant challenges imposition of death penalty on basis of racial discrimi-

nation, validity of regression model depends upon showing that it predicts variations in dependent variable to some substantial degree. U.S.C.A. Const.Amend. 14.

#### 19. Constitutional Law =250.3(1)

Where gross statistical disparity can be shown, that alone may constitute prima facie case of discrimination in imposition of death penalty. U.S.C.A. Const.Amend. 14.

#### 20. Civil Rights =13.13(1)

Generally, once discrimination plaintiff has put on prima facie statistical case, burden shifts to defendant to go forward with evidence showing either existence of legitimate nondiscriminatory explanation for its actions or that plaintiff's statistical proof is unacceptable. U.S.C.A. Const.Amend. 14.

#### 21. Evidence €150

Statistics relied upon by plaintiff in discrimination case to establish prima facie case can form basis of defendant's rebuttal case, when, for example, defendant shows that numerical analysis is not the product of good statistical methodology U.S.C.A. Const.Amend. 14.

#### 22. Evidence =150

Prima facie case of discrimination is not established until plaintiff has demonstrated both that data base is sufficiently accurate and that regression model has been properly constructed. USCA. Const.Amend. 14.

#### 23. Evidence €150

Statistics produced on weak theoretical foundation are insufficient to establish prima facie discrimination case. U.S.C.A. Const.Amend. 14.

#### 24. Evidence =150

Once prima facie discrimination case is established, burden of production is shifted to defendant and if it has not already become apparent from plaintiff's presentation, it then becomes defendant's burden to demonstrate plaintiff's statistics are misleading and such rebuttal may not be made by speculative theories. U.S.C.A. Const. Amend. 14.

#### 25. Evidence =150

Statistics on Georgia death penalty statute did not demonstrate prima facie case in support of contention that death penalty was imposed upon defendant because of his race or because of race of his victim since there was no consistent statistically significant evidence that death penalty was being imposed because defendant was black and victim was white, and even if prima facie case was made, the state rebutted statistical evidence by showing existence of another explanation for the observed result, i.e., that white victim cases were acting as proxies for aggravated cases and black victim cases were acting as proxies for mitigated cases. U.S.C.A. Const.Amend. 14.

#### 26. Witnesses @367(1)

The rule announced by the Supreme Court in Giglio v. United States holding that the jury must be apprised of any promise which induces key government witness to testify on government's behalf applies not only to traditional deals made by prosecutor in exchange for testimony but also to any promises or understandings made by any member of prosecutorial team, which includes police investigators.

#### 27. Witnesses @367(1)

A promise, made prior to witness' testimony, that investigating detective will speak favorably to federal authorities concerning pending federal charges is within scope of Giglio v. United States because it is sort of promise of favorable treatment which could induce witness to testify falsely on behalf of government.

## 28. Constitutional Law 3268(5)

Failure of the state to disclose understanding with one of its key witnesses regarding pending Georgia criminal charges violated defendant's due process rights; disclosure of the promise of favorable treatment and correction of other faisehoods in the witness testimony could reasonably have affected jury vertict on charge of malice murder. U.S.C.A. Const. Amend. 14.

#### 29. Constitutional Law =266(7)

Due process clause protects accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute crime with which he is charged. U.S.C.A. Const.Amend. 14.

#### 30. Criminal Law (\$778(2. 5)

Jury instructions which relieve prosecution of burden of proving beyond a reasonable doubt every fact necessary to constitute crime with which defendant is charged or which shift to accused burden of persuasion on one or more elements of crime are unconstitutional. U.S.C.A. Const.Amend. 14.

## 31. Criminal Law = 778:5:

In analyzing a Sandstrom claim, court must first examine crime for which defendant has been convicted and then examine complained-of charge to determine whether charge unconstitutionally shifted burden of proof on any essential element of crime U.S.C.A. Const.Amend. 14.

#### 32. Robbery €11

Offense of armed robbery under Georgia law contains elements of taking of property from person or immediate presence of person by use of offensive weapon with intent to commit theft. Ga Code § 26-1002

#### 33. Homicide =:

Under Georgia law, offense of murder contains essential elements of homicide, malice aforethought, and unlawfulness O.C.G.A. § 16-5-1.

#### 34. Homicide =11

Under Georgia law, "malice" element, which distinguishes murder from lesser of-fense of voluntary manslaughter, means simply intent to kill in the absence of provocation. O C G A \$ 16-5-1

See publication Words and Phrases for other judicial constructions and definitions

### 35. Criminal Law Catteria

In Georgia murder prosecution, jury instruction stating that acts of person of sound mind and discretion are presumed to be part of person - will and person of sound mind and discretion is presumed to intend natural and probable consequences of his act, both of which presumptions may be rebutted, taken in context of entire charge to jury, created only permissive inference that jury could find intent based upon all facts and circumstances of case, and thus, did not violate Sandstrom.

## 36. Criminal Law \$1172.2

Even if challenged jury instructions regarding burden of proof in murder prosecution violated Sandstrom, error was harmless beyond a reasonable doubt since it could not be concluded that there was any reasonable likelihood that intent instruction, even if erroneous, contributed to jury's decision to convict defendant of malice murder and armed robbery under Georgia law. Ga.Code, § 26-1902: O.C.G.A. § 16-5-1.

## 37. Criminal Law 633111

References in criminal prosecution to appellate process are not per se unconstitutional unless on record as a whole it et a be said that it rendered entire trial fundamentally unfair.

# 38. Criminal Law \$713. 722%

In Georgia murder prosecution, prosecutor's arguments did not intimate to jurithat death sentence could be reviewed or set aside on appeal; rather, prosecutor's argument referred to defe dant's prior criminal record and sentences he had received and such arguments were not impermissible.

## 39. Costs = 302.2121

Under Georgia law, appointment of expert in criminal prosecution ordinarily lies within discretion of trial court.

#### 40. Costs =302.2(2)

In Georgia murder prosecution, trial court did not abuse its discretion in denying defendant funds for additional ballistics expert since defendant had ample opportunity to examine evidence prior to trial and to subject state's expert to thorough cross-examination.

## 41. Criminal Law (\$369.2(4))

In murder prosecution, evidence tending to establish that defendant had participated in earlier armed robberies employing same modus operandi and that in one of those robberies he had stolen what was alleged to have been weapon that killed police officer in instant robbery was admissible under Georgia law.

# 42. Criminal Law (=783(1)

In murder prosecution, trial court's jury instructions regarding use of evidence of prior crimes, which evidence was admissible, were not overbroad and did not deny defendant a fair trial under Georgia law

# 43. Criminal Law =1208.1(6)

In prosecution for armed robbery and malice murder, trial judge specifically instructed jury that it could not impose death penalty unless it found at least one statutory aggravating circumstance and that if it found one or more statutory aggravating circumstances it could also consider any other mitigating or aggravating circumstances in determining whether or not death penalty should be imposed, and thus trial court did not err by giving jury complete and limited discretion to use any of evidence presented at trial during its deliberations regarding imposition of death penalty under Georgia law.

## 44. Habeus Corpus @25 1/81

In prosecution for armed robbers and malice murder admission of evidence concerning two prior armed robberses for a nich defendant has a been indirect and admission of details of other prior armed robberses for a nich be had been convicted was not so seriously prejudicial that it undermined reliability of guilt determination under Georgia law although such evidence probably would not have been admissible in federal prosecution.

## 45. Habeas Corpus > 5.5.5-11

In habitals corpus proceeding there was no base in record or in arguments presented by defendant for concluding that the Georgia Supreme Court was in error in finding that lineup was not impermissibly

suggestive and that in-court identifications were reliable.

## 46. Criminal Law =412.1(1)

In Georgia prosecution for armed robbery and malice murder, trial judge did not err in finding that statement given to police officers was freely and voluntarily given; therefore, there was no error in admitting statement into evidence.

#### 47. Jury =108

In Georgia prosecution for armed robbery and malice murder, since two prospective jurors indicated they would not under any circumstances vote for death penalty, trial court committed no error in excluding

#### 48. Jury =33(2.1)

In Georgia prosecution for armed robbery and malice murder, exclusion of death-scrupled jurors did not violate defendant's right to be tried by jury drawn from representative cross section of community.

## 49. Criminal Law =627.5(1)

Brady does not establish any right to pretrial discovery in a criminal case, but instead seeks only to insure fairness of defendant's trial and reliability of jury's determinations.

## 30. Criminal Law =914

Defendant who seeks new trial under Brady must, to establish a successful claim, show prosecutor's suppression of evidence, favorable character of suppressed evidence for the defense, and materiality of suppressed evidence.

## 51. Constitutional Law (#268(5)

Since certain evidence was before jury in Georgia prosecution for armed robbery and malice murder, nabeas court could not find that failure to disclose it prior to trial deprived defendant of due process. U.S. C.A. Const.Amend. 14.

## 52. Habeas Corpus \$55.1(1), 92(1)

In reviewing sufficiency of evidence on habeas corpus petition, district court must view evidence in a light most favorable to the state and should sustain jury verdict

unless it finds that no rational trier of fact could find defendant guilty beyond a reasonable doubt.

#### 53. Homicide = 253(1)

Testimonial and circumstantial evidence was sufficient to sustain conviction for malice murder under Georgia law.

# 54. Criminal Law =641.13(4)

Criminal defendant is entitled to effective assistance of counsel, that is, counsel reasonably likely to render reasonably effective assistance. U.S.C.A. Const.Amend.

#### 55. Criminal Law =641.13(1)

The constitution does not guarantee errorless counsel in criminal prosecution. U.S.C.A. Const.Amend. 6.

#### 56. Habeas Corpus =85.5(9)

In order to be entitled to habeas corpus relief on claim of ineffective assistance of counsel, petitioner must establish by a preponderance of the evidence that based upon totality of circumstances in entire record his counsel was not reasonably likely to render and in fact did not render reasonably effective assistance and that ineffectiveness of counsel resulted in actual and substantial disadvantage to course of his defense. U.S.C.A. Const.Amend. 6.

#### 57. Habeas Corpus =25.1(6)

Even if habeas corpus petitioner meets burden of establishing ineffective assistance of counsel, relief may be denied if state can prove that in context of all evidence it remains certain beyond a reasonable doubt that outcome of proceedings would not have been altered but for ineffectiveness of counsel. U.S.C.A. Const. Amend. 6.

## 56. Criminal Law = 641.13(2)

In Georgia prosecution for armed robbery and malice murder, given contradictory descriptions given by witnesses at store, inability of witness to identify defendant, defendant's repeated statement that he was not present at scene, and possible outcome of pursuing the only other defense available, trial counsel's decision to pursue alibi defense was not unreasonable and did not constitute ineffective assistance of counsel. U.S.C.A. Const.Amend. 6.

# 59. Criminal Law ==641.13(6)

Failure of trial counsel in Georgia prosecution for armed robbery and malice murder to interview store employees was not unreasonable, trial counsel having made reasonable strategic choice to pursue alibi defense, and thus, was not ineffective assistance of counsel. U.S.C.A. Const. Amends, 6, 14.

## 60. Habeas Corpus =25.1(6)

Habeas corpus petitioner was not entitled to relief on grounds that his counsel was ineffective because he did not disbelieve petitioner and had undertaken independent investigation.

# 61. Criminal Law (>641.13(6)

In Georgia prosecution for armed robbery and malice murder, trial counsel was not ineffective because he failed to interview state's ballistics expert where counsel had read expert's report and was prepared adequately to cross-examine expert at trial. U.S.C.A. Const.Amend. 6.

# 62. Criminal Law (=641.13(2)

Since there was nothing unconstitutional about chance viewing of defendant prior to trial, failure of trial counsel to move for continuance or mistrial on basis of suggestive lineary procedure did not constitute ineffective assistance of counsel. U.S.C.A. Const.Amend. 6.

# 63. Habeas Corpus @85.5(11)

Assuming that failure of trial counsel to investigate prior convictions of defendant constituted ineffective assistance of counsel, petitioner could not show actual and substantial prejudice resulting from ineffectiveness warranting habeas relief.

2U.S.C.A. Const.Amend. 6.

# 64. Criminal Law =641.13(2)

In Georgia prosecution for armed robbery and maine murder, trial court's instructions on presumptions of intent, other acts evidence and aggravating circumstances were not erroneous or overbroad: thus,

failure of trial counsel to object to instructions did not constitute ineffective assistance of counsel. U.S.C.A. Const.Amend. 6.

## 65. Habeas Corpus =85.5(9)

In habeas corpus proceeding record did not support finding of actual and substantial prejudice to defendant due to ineffective assistance of trial counsel at sentencing phase. U.S.C.A. Const.Amend. 6.

# 66. Habeas Corpus \$25.1(6)

There was no actual and substantial prejudice caused to habeas petitioner by trial counsel's failure to review and correct mistake in trial judge's posttrial sentencing report, even if such failure constituted ineffective assistance of counsel. U.S.C.A. Const.Amend. 6.

Robert H. Stroup, Atlanta, Ga., Jack Greenberg, John Charles Boger, New York City, Timothy K. Ford, Seattle, Wash., Anthony G. Amsterdam, N.Y. University Law School, New York City, for petitioner

Michael J. Bowers, Atty. Gen., Mary Beth Westmoreland, Asst. Atty. Gen., Atlanta, Ga., for respondent.

# ORDER OF THE COURT

# FORRESTER. District Judge

Petitioner Warren McCleskey was convicted of two counts of armed robbery and one count of malice murder in the Superior Court of Fulton County on October 12. 1978. The court sentenced McCleskey to death on the murder charge and to consecutive life sentences, to run after the death sentence, on the two armed robbery charges. On automatic appeal to the Supreme Court of Georgia the convictions and the sentences were affirmed. McClesha v State, 245 Ga. 108, 263 S.E.2d 146 (19em) The Supreme Court of the United States denied McCleskey's petition for a writ of certiorari. McClesky v. Georgia, 449 U.S. 891, 101 S Ct. 253, 66 L Ed.2d 119 (1984). On December 19, 1940 petitioner filed an extraordinary motion for a new trial in the Superior Court of Fulton County No hear ing has ever been held on this motion Petitioner then filed a petition for writ of habeas corpus in the Superior Court of Butts County. After an evidentiary hearing the Superior Court denied all relief sought. McCleskey v. Zant. No. 4909 (Sup.Ct. of Butts County, April 8, 1981). On June 17, 1981 the Supreme Court of Georgia denied petitioner's application for a certificate of probable cause to appeal the decision of the Superior Court of Butts County. The Supreme Court of the United States denied certiorari on November 30, 1981. McCleskey v. Zant. 454 U.S. 1093, 102 S.Ct. 659, 70 L.Ed.2d 631 (1981).

Petitioner then filed this petition for writ of habeas corpus on December 30, 1981. He asserts 18 separate grounds for granting the writ. Some of these grounds assert alleged violations of his constitutional rights during his trial and sentencing Others attack the constitutionality of Georgia's death penalty. Because peticioner claimed to have sophisticated statistical evidence to demonstrate that racial discrimination is a factor in Georgia's capital sentencing process, this court held an extensive evidentiary hearing to examine the merits of these claims. The court's discussion of the statistical studies and their legal significance is in Part II of this opinion. Petitioner's remaining contentions are discussed in Part. III through XVI. The court has concluded that petitioner is entitled to relief on only one of his grounds, his claim that the prosecution failed to reveal the existence of a promise of assistance made to a key witness. Petitioner's remaining contentions are without ment.

## I. DETAILS OF THE OFFENSE.

On the morning of May 13, 1978 petitioner and Ben Wright, Bernard Dupree, and David Burney decided to rob a jewelry store in Marietta. Georgia. However, after Ben Wright went into the store to check it out, they decided not to rob it. The four then rode around Marietta looking for another suitable target. They eventually decided to rob the Dixie Furniture Store in Atlanta. Each of the four was armed. The evidence showed that McCleskey shows 15 supplies.

carried a shiny nickel-plated revolver matching the description of a .38 caliber Rossi revolver stolen in an armed robberv of a grocery store a month previously Ben Wright carried a sawed-off shotgun. and the other two carried pistols. McCleskey went into the store to see how many people were present. He walked around the store looking at furniture and talking with one of the sales clerks who quickly concluded that he was not really interested in buying anything. After counting the people in the store, petitioner returned to the car and the four men planned the robbery. Executing the plan, petitioner entered the front of the store while the other three entered the rear by the loading dock. Petitioner secured the front of the store by rounding up the people and forcing them to lie face down on the floor. The others rounded up the employees in the rear and began to tie them up with tape. The manager was forced at gunpoint to turn over the store receipts, his watch, and \$6.00. Before the robbery could be completed. Officer Frank Schlatt, answering a silent alarm, pulled his patrol car up in front of the building. He entered the front door and proceeded down the center aisle until he was almost in the middle of the store. Two shots then rang out, and Officer Schlatt collapsed, shot once in the face and once in the chest. The builet that struck Officer Schlatt in the chest recocheted off a pocket lighter and lodged in a nearby sofu. That bullet was recovered and subsequently determined to have been fired from a 38 caliber Rossi revolver. The head wound was fatal. The robbers all fled. Several weeks later petitioner was arrested in Cobb County in connection with another armed robbery. He was turned over to the Atlanta police and gave them a statement confessing participation in the Dixie Furniture Store robbery but denying the shooting

Although the murder weapon was never recovered, evidence was introduced at trial that petitioner had stolen a 38 caliber Rossi in an earlier armed robbery. The State also produced evidence at trial that tended to show that the shots were fired from the front of the store and that petitioner was

the only one of the four robbers in the front of the store. The State also introduced over petitioner's objections the statements petitioner had made to Atlanta police. Finally, the State produced testimony by one of the co-defendants and by an inmate at the Fulton County Jail that petitioner had admitted shooting Officer Schlatt and had even boasted of it. In his defense petitioner offered only an unsubstantiated alibi defense.

The jury convicted petitioner of malice murder and two counts of armed robbery. Under Georgia's bifurcated capital sentencing procedure, the jury then heard arguments as to the appropriate sentence. Petitioner offered no mitigating evidence. After deliberating the jury found two statutory aggravating circumstances—that the murder had been committed during the course of another capital felony, an armed robbery; and that the murder had been committed upon a peace officer engaged in the performance of his duties. The jury sentenced the petitioner to death on the murder charge and consecutive life sentences on the armed robbery charges.

- II THE CONSTITUTIONALITY OF THE GEORGIA DEATH PENAL-TY
- A. An Analytical Framework of the

Petitioner contends that the Georgia death penalty statute is being applied arbitrarily and capriciously in violation of the Eighth and Fourteenth Amendments to the United States Constitution. He concedes at this level that the Eighth Amendment issue has been resolved adversely to him in this circuit. As a result, the petitioner wishes this court to hold that the application of a state death statute that permits the imposition of capital punishment to be based on factors of race of the defendant or race of the victim violates the equal protection clause of the Fourteenth Amendment.

[1] It is clear beyond peradventure that the application of a statute, neutral on its

face, unevenly applied against minorities, is a violation of the equal protection clause of the Fourteenth Amendment. Yick Wo v. Hopkins, 118 U.S. 356, 6 S.CL 106: 30 L.Ed. 220 (1886). The more difficult question presented is why under the facts of this case the petitioner would be denied equal protection of the law if he is sentenced to death because of the race of his victim. This quandry has led the Eighth Circuit to find that a petitioner has no standing to raise this claim as a basis for invalidating his sentence. Britton v. Rogers. 631 F.2d 572, 577 n. 3 (8th Cir.1980). cert. denied. 451 U.S. 939. 101 S.Ct. 2021. 68 L.Ed.2d 327 (1981).

While this circuit in Spinkellink v Wainunight. 578 F.2d 582 (5th Cir.1978). reh'g denied. 441 U.S. 937, 99 S.Ct. 2064. 60 L.Ed.2d 667, application for stay denied. 442 U.S. 1301. 99 S.Ct. 2091. 60 L.Ed.2d 649 (1979), seemed to give lip service to this same point of view by approving the proposition that a district court "must conclude that the focus of any inquiry into the application of the death penalty must necessarily be limited to the persuns who receive it rather than their victims." ed. at 614 n. 39, the court in Spinkellink also adopted the position that a petitioner such as McCleskey would have standing to sue in an equal protection con-

Spinkellink [petitioner] has standing to raise the equal protection issue, even though he is not a member of the class allegedly discriminated against, because such discrimination, if proven, impinges on his constitutional right under the Eighth and Fourteenth Amendments not to be subjected to cruel and unusual punishment. See Taylor v. Louisiana, supra, 419 U.S. [522] at 526 [95 S.Ct. 692 at 695, 42 L.Ed.2d 690].

Id at 612 n. 36. This footnote in Spinkellink warrants close examination. In Taylor v. Louisiana. 419 U.S. 522. 95 S.Ct. 692. 42 L.Ed.2d 690 (1975), the Supreme Court held that a male had standing to challenge a state statute providing that a woman should not be selected for jury service unless she had previously filed a written declaration of her desire to be subject to jury service. The Court in Taylor cited to Peters v. Kiff. 40". U.S. 493, 92 S.Ct. 2163. 33 LEd.2d 83 (1972), to conclude: Taylor, in the case before us, was similarly entitled to tender and have adjudicated the claim that the exclusion of women from jury service deprived him of the kind of factfinder to which he was constitutionally entitled." Id. at 526, 95 S.Ct. at 696. In Peters the Supreme Court rejected the contention that because a petitioner is not black, he has not suffered any unconstitutional discrimination. The rejection of the argument, however, was based not on equal protection grounds, but upon due process grounds. See 407 U.S. at 496-97. 497 n. 5. 501, 504, 92 S.Ct. at 2165-66 n. 5 2168, 2169; id. at 309, 92 S.Ct. at 2171 (Burger, CJ., dissenting).

Thus, for Spinkellink to articulate an equal protection standing predicate based upon Sixth Amendment and due process cases can be characterized, at best, as curious. Furthermore, not only does it appear that case law in this circuit subsequent to Spinkellink assumes that a contention similar to that advanced by petitioner here is cognizable under equal protection, sec. e.g. Adams v. Wainwright, 709 F.2d 1443. 1449-50 (11th Cir.), rehig en bone denied. 716 F 2d 914 (11th Cir.1983): Smith P. Baikcom, 671 F.2d 858 (5th Cir 1982) (Unit B); but it appears that this circuit is applying equal protection standards to Eighth Amendment challenges of the death penalty See. e.g. Adams r Wainumght, supra. Accord. Harms v. Pulley. 692 F 2d 1169, 1197-98 (9th Cir 1982), reversed and remanded on other grounds. - U.S. - 104 S.Ct. 871. 79 L.Ed.2d 29 (1984). Indeed, in Spinkeilink itself, the court adopted an analytical nexus between a cruel and unusual punishment contention and a Fourteenth Amendment equal protection evidentiary showing:

[T]his is not to say that federal courts should never concern themselves on federal habeas corpus review with whether Section 921.141 [Florida's death penalty statute] is being applied in a racially

discriminatory fashion. If a petitioner can show some specific act or acts evidencing intentional or purposeful racial discrimination against him. see Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 [97 S.Ct. 555, 50 L.Ed.2d 450] (1977), either because of his own race or the race of his victim, the federal district court should intervene and review substantively the sentencing decision.

Spinkellink, 578 F.2d at 814 n. 40.

- [2] Principles of stare decisis, of course, mandate the conclusion that petitioner has standing to bring forth his claim. Furthermore, under stare decisis, this court must strictly follow the strictures of Spinkellink and its progeny as to standards of an evidentiary showing required by this petitioner to advance successfully his claim.
- [3] Were this court writing on a clean slate, it would hold that McCleskey would have standing under the due process clause of the Fourteenth Amendment, but not under the equal protection clause or the Eighth Amendment, to challenge his conviction and sentenced if he could show that they were imposed on him on account of the race of his victim. From a study of equal protection jurisprudence, it becomes apparent that the norms that underlie equal protection involve two values: in the right to equal treatment is inherently good. and is the right to treatment as an equal is inherently good. See L. Tribe. American Constitutional Law 9 16-1. at 991-93 11975. In this case, however, the evidence shows that the petitioner is being treated as any member of the majority would, or that petitioner's immutable characteristics have no bearing on his being treated differently from any member of the majority Thus, with reference to his argument that he is being discriminated against on the basis of the race of his victim, equal protection interests are not being implicated.
- [4.5] Petitioner also fails to state a claim under the Eighth Amendment. It is clear from the decisions of the Supreme

Court that the death penalty is not per se cruel and unusual in violation of the Eighth Amendment. Prior to Furman v. Georgia. 408 U.S. 238, 92 S.CL 2726, 33 L.Ed.2d 346 (1972), the cruel and unusual punishments clause was interpreted as applicable to contentions that a punishment involved unnecessary pain and suffering, that it was so unique as not to serve a humane purpose. or so excessive as not to serve a valid legislative purpose. See Furman, 408 U.S. at 330-33, 92 S.Ct. at 2772-74 (Marshall, J., concurring). In other words, Eighth Amendment jurisprudence prior to Furman entailed an inquiry into the nexus between the offense and punishment; that punishment which was found to be excessive was deemed to violate Eighth Amendment concerns. The Supreme Court has determined as a matter of law that where certain aggravating features are present the infliction of the death penalty is not violative of the Eighth Amendment. Grego v. Georgia. 428 U.S. 153. 96 S.Ct. 2909. 49 L.Ed.2d 859 (1976). In the instant case. petitioner's race of the victim argument does not address traditional Eighth Amendment concerns. His argument does not entail-nor could he senously advanceany contention that his penalty is disproportionate to his offense, that his penulty constitutes cruel and unusual punishment. or that his penalty fails to serve any valid legislative interest.

[6] What petitioner does contend is that the Georgia system allows for an impermissible value judgment by the actors within the system—that white life is more valuable than black life-and, as a practical matter, that the Georgia system allows for a double standard for sentencing Certainly, such allegations raise life and liberty interests of the petitioner Furthermore, such allegations speak not to the rationality of the process but to the values inherent in the process. In other words, it is the integrity, propriety, or "fairness" of the process that is being questioned by petitioner's contention, and not the mechanics or structure of the process. Thus, petitioner's allegation of an impermissible process speaks most fundamentally to Fourteenth Amend-

ment due process interests, rather than Eighth Amendment interests that traditionally dealt with "cruel and unusual" contexts.

For all its consequences. "due process" has never been, and perhaps can never be, precisely defined. "[U]nlike some legal rules," this Court has said, due process "is not a technical conception with a fixed content unrelated to time, place and circumstances." Cafeteria Workers v. McEiroy. 367 U.S. 886. 895 [81 S.Ct. 1743, 1748, 6 L.Ed.2d 1230]. Rather, the phrase expresses the requirement of fundamental fairness." a requirement whose meaning can be as opaque as its importance is lofty. Applying the Due Process Clause is therefore an uncertain enterprise which must discover what "fundamental fairness" consists of in a particular situation by first considering any relevant precedents and then by assessing the several interests that are at

Lassiter a. Department of Social Services. 452 U.S. 18, 24-25, 101 S.C., 2133, 2138-2159, 68 L.Ed.2d \$40 (1981). It is clear that due process of law within the meaning of the Fourteenth Amendment mandates that the laws operate on all alike such that an individual is not subject to an arbitrary exercise of governmental power. Sec. e.g., Leepen a Terms, 130 US 402, 467-46, 18 S.C., 577, 579-80, 35 L.Ed. 225 (1891). Hurtado a. California, 110 US 516, 545-36, 48 Ct. 111, 120-21, 25 L.Ed. 202 (1884). As Justice Frankfurter observed in Rockina a. California, 342 US 163, 72 S.C., 205, 96, L.Ed. 193 (1952) (footnote omitted).

Regard for the requirements of the Incomposes. Clause "inescapably imponent upon this Court an exercise of judgment upon the whole course of the proceeding fresulting in a conviction, in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of Englishments are pressible of the proceeding peoples even toward those charged with the most hemous offenses." Malinski v. New York, supera [324 U.S. 401] at 416-17 [65 S.C. 781 at

789. 89 L.Ed. 1029]. The standards of justice are not authoritatively formulated anywhere as though they were specifics. Due process of law is a summarized constitutional guarantee of respect for those personal immunities which, as Mr. Justice Cardozo twice wrote for the Court. are "so rooted in the traditions and conscience of our people as to be ranked as fundamental." Snyder v. Massachusetts. 291 U.S. 97, 105 [54 S.Ct. 330, 332, 78 LEd. 674], or are "implicit in the concept of ordered liberty." Palko v. Connecticut. 302 U.S. 319, 325 [58 S.Ct. 149, 152, 82 LEd. 288].

See also Peters v. Kiff. 407 U.S. 493, 501. 92 S.CL 2163. 2168. 33 L.Ed.2d 93 (19:2 ("A fair trial in a fair tribunal is a basic requirement of due process") (citing In Re Murchison, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942 (1955). See generally, L. Tribe, supra. \$ 10-7, at 501-06.

In summary, the court concludes that the petitioner's allegation with respect to race of the victim more properly states a claim under the due process clause of the Fourteenth Amendment. The allegation is that the death penalty was imposed for a reason beyond that consented to by the governed and because of a value judgment which, though rational, is morally impermissible in our society. As such, McCleskey could fairly claim that he was being denied his life without due process of law Although he couches his claims in terms of "arbitrary and capricious." he is, to the contrary, contending not that the death penalty was imposed in his case arbitrurily or capriciously but on account of an intentional application of an impermissible criterion As the Supreme Court predicted in Gregg and as petitioner's evidence shows, the Georgia death penalty system is far from arbitrary or capricious

This court is not, however, writing on a clean state. Instead, it is obliged to follow the interpretations of its circuit on such claims. As noted earlier Fick No gives because of his race and Spinkellink green 103 S Ct. 181, 74 L Ed 24 148 (1982)

him standing under the equal protection clause to attack his sentence because it was imposed because of the race of his victim. McCleskey is entitled to the grant of a writ of habeas corpus if he establishes that he was singled out for the imposition of the death penalty by some specific act or acts evidencing an intent to discriminate against him on account of his race or the race of his victim. Smith r. Balkcom. 660 F 2d 573 (5th Cir. Unit B 1981), modified in part. 671 F.2d 658 (1962): Spinkellink. supra. In Stephens v Kemp. - US - 104 S.Ct. 562, 78 L.Ed.2d 370 (1983). Justice Powell, in a dissent joined in by the Chief Justice and Justices Rehnquist and O'Connor, made the following statement with reference to the Baldus study:

Although characterized by the judges of the court of appeals who dissented from the denial of the hearing en banc as a "particularized statistical study" claimed to show "intentional race discrimination. no one has suggested that the study focused on this case A "particularized" showing would require—as I understand it-that there was intentional race diserimination in indicting trying and convicting Stephens and presumably in the state appellate and state collateral review that several times follows the trial Id 104 S Ct at 564 a. 2 Powell J dissent-

[7.8] The intentional discrimination which the law requires cannot generally be shown by statistics alone Spencer : Zowe 715 F 26 1561 15+1 (11th Car 19+3) reing en bane granted Till F 2s 1583 (11th Cir 1990). Dispurate impact alone is insufficient to establish a violation of the Fourteenth Amendment unless the evidence of dispurate impact is so strong that the only permissible inference is one of intentional discrimination Sellingn r Vainumget 721 F 26 316 (11th Cir 1983), Adams Warn emgir 109 F 25 1443 (11th Cir 1983) McCleskey standing to attack his sentence Smith v. Balkeam, 571 F 2d 854 854 (5th on the basis that it was imposed on him. Cir. Unit Bi. cord. denied. 450 L S. Sall

B. An Analytical Framework of Petitioner's Statistical Evidence.

The petitioner does rely upon statistical evidence to support his contentions respecting the operation of racial discrimination on a statewide basis. He relies on statistical and anecdotal evidence to support his contentions that racial factors play a part in the application of the death penalty in Fulton County where he was sentenced.

Statistical evidence, of course, is nothing but a form of circumstantial evidence. Furthermore, it is said "that statistics are not irrefutable, they come in infinite vanety and, like any other kind of evidence, they may be rebutted. In short, their usefulness depends on all of the surrounding facts and circumstances." Teamsters 1: United States. 431 U.S. 324, 340, 97 S.Ct. 1843, 1857, 32 L.Ed.2d 306 (1977).

- [9] As courts have dealt with statistics in greater frequency, a body of common law has developed a set of statistical conventions which must be honored before statistics will be admitted into evidence at all or before they are given much weight. These common law statistical conventions prevail even over the conventions generally accepted in the growing community of economotricians. The first convention which has universally been honored in death penalty cases is that any statistical analysis must reasonably account for racially neutral variables which could have produced the effect observed. See Smith r. Balkcom supra: Spinkellink v. Wainwright. 578 F 2d 582, 612-16 (5th Cir 1978), cert. denied. 440 U.S. 976, 99 S.Ct. 1548, 59 L Ed. 26 796 (1979); McCorquodale : Balk com. 705 F.24 1553, 1556 (11th Cir 1983).
- [10] The second convention which applies in challenges brought under the equal protection clause is that the statistical evidence must show the likelihood of discriminatory treatment by the decision-makers who made the judgments in question. Advans it Wainumght, supra. Manuell it Bishop, 398 F 2d 138 (8th Cir. 1968) (Blackmun, J.), vacated on other grounds, 398

U.S. 262, 90 S.Ct. 1578, 26 L.Ed.2d 221

- (11-13) The third general statistical convention is that the underlying data must be shown to be accurate. The fourth is that the results should be statistically significant. Generally, a statistical showing is considered significant if its "P" value is .05 or less, indicating that the probability that the result could have occurred by chance is 1 in 20 or less. Said another way, the observed outcome should exceed the standard error estimate by a factor of 2. Eastland v. TVA, 704 F 2d 613, 622 n. 12 (11th Cir 1983).
- [14] McCleskey relies primarily on a statistical technique known as multiple regression analysis to produce the statistical evidence offered in support of his contentions. This technique is relatively new to the law. This court has been able to locate only six appellate decisions where a party to the litigation relied upon multiple regression analysis. In two of them, the party relying on the analysis prevailed, but in both cases their showings were supported by substantial anecdotal evidence. E.g., Wade r. Mississippi Cooperative Estension Service, 528 F 2d 308 (5th Cir 1976) In four of them, the party relying upon the technique was found to have failed in his attempt to prove something through a reliance on it. Generally, the failure came when the party relying upon multiple regression analysis failed to honor conventions which the courts insisted upon. Before a court will find that something is established based on multiple regression analysis, it must first be shown that the model includes all of the major variables likely to have an effect on the dependent variable. Second, it must be shown that the unaccounted-for effects are randomly distributed throughout the universe and are not correlated with the independent variables included Enstland, supra at
- [15] In multiple regression analysis one builds a theoretical statistical model of reality and then attempts to control for all

possible independent variables while measuring the effect of the variable of interest upon the dependent variable. Thus, a properly done study begins with a decent theoretical idea of what variables are likely to be important. Said another way, the model must be built by someone who has some idea of how the decision-making process under challenge functions. Three kinds of evidence may be introduced to validate a regression model: (1) Direct testimony as to what factors are considered. (2) what kinds of factors generally operate in a decision-making process like that under challenge, and (3) expert testimony concerning what factors can be expected to influence the process under challenge. Eastland. supra, at 623 (quoting Baldus and Cole. Statistical Proof of Discrimination ).

[16-18] Other cases have established other conventions for the use of multiple regression analysis. It will be rejected as a tool if it does not show the effect on people similarly situated: across-the-board disparities prove nothing EEOC v. Federal Reserve Bank of Richmond. 698 F 2d 633, 656-58 (4th Cir.1983), appeal pending: Valentino v. U.S. Postal Service 674 F.2d 56. 70 (D.C.Cir.1982). A regression model that ignores information central to understanding the causal relationships at issue is insufficient to raise an inference of discrimination. Valentino, supra, at 71. Finally. the validity of the model depends upon a showing that it predicts the variations in the dependent variable to some substantial degree. A model which explains only 52 or 53" of the variation is not very reliable. Wilkins v. University of Houston, 654 F.2d 388, 405 (5th Cir 1981), cert. denied. 459 U.S. 822, 103 S.Ct. 51, 74 L.Ed.2d 57

[19] "To sum up, statistical evidence is circumstantial in character and its acceptability depends upon the magnitude of the disparity it reflects, the relevance of its supporting data and other circumstances in the case supportive of or in rebuttal of a hypothesis of discrimination." EEOC r. Federal Reserve Bank of Richmond. supro. at 646-47. Where a gross statistical See Eastland supra, at 618. Could a Hot

disparity can be shown, that alone may constitute a prima facie case of discrimination. This has become the analytical framework in cases brought under Title VII of the Civil Rights Act of 1964. Because Fourteenth Amendment cases have a similar framework and because there are relatively few such cases relying on statistics, when appropriate the court may draw upon Title VII cases. Jean v. Nelson. 711 F 2d 1455, 1486 n. 30 (11th Cir.), rehig en banc granted, 714 F.2d 96 (1983).

[20-23] Generally it is said that once the plaintiff has put on a prima facie statistical case, the burden shifts to the defendant to go forward with evidence showing either the existence of a legitimate non-discriminatory explanation for its actions or that the plaintiff's statistical proof is unacceptable Johnson -r Uncle Ben's. Inc. 628 F.2d 419 (5th Cir. 1980), cert. denicd. 459 U.S. 967, 103 S.Ct. 293, 74 L.Ed.2d 277 (1982). The statistics relied upon by the plaintiff to establish a prima facie case can form the basis of the defendant's rebuttal case when, for example, the defendant shows that the numerical analysis is not the product of good statistical methodolo-E. EEOC v. Datapoint Corp., 570 F.2d 1264 (5th Cir.1978). Said another wav. a prima facie case is not established antil the plaintiff has demonstrated both that the data base is sufficiently accurate and that the regression model has been properly Otherwise, the evidence constructed would be insufficient to survive a motion for directed verdict, and this is the sine que non of a prima facie case. Jean. supro. at 1487. Statistics produced on a weak theoretical foundation are insuffcient to establish a prima facie case Eastland, supra, at 625

[24] Once a prima facie cuse is established the burden of production is shifted to the respondent. If it has not already become apparent from the plaintiff's prosentation, it then becomes the defendant's burden to demonstrate that the plaint.ff's statistics are misleading, and such retuition may not be made by speculative theories Springs School District, 682 F.2d 721, 730-31 (8th Cir.1982); Jean v. Nelson, supra.

#### C. Findings of Fact.

The court held an evidentiary hearing for the purpose of enabling the petitioner to put on the evidence he had in support of his contention that racial factors are a consideration in the imposition of the death penalty. Hereafter are the court's findings as to what was established within the context of the legal framework set out above.

#### 1. The Witnesses

The principal witness called by the petitioner was Professor David C. Baldus. Professor Baidus is a 48-year-old Professor of Law at the University of Iowa. Presently he is on leave from that post and is serving on the faculty of the University of Syracuse. Baidus's principal expertise is in the use of statisticial evidence in law. He and a statistician, James Cole, authored a book entitled Statistical Proof of Discrimination that was published by McGraw-Hill In 1980. R 54-56. He has done several pieces of social science research involving legal issues and statistical proof. R 45-46 53.

Before he became involved in projects akin to that under analysis here. Baldus apparently had had little contact with the criminal justice system. In law school he took one course which focused heavily on the rationale of the law of homicide R 39. During his short stint in private practice he handled some habeas corpus matters and had discussions with a friend who was an Assistant District Attorney concerning the kinds of factors which his friend utilized in deciding how to dispose of cases. R 43-44 As a part of the preparation of statistical proof of discrimination. Baldus and his coauthor. Cole, re-evaluated the data set relied upon in Mazwell v. Bishop. 398 F.2d 138 (8th Cir. 1968), racated on other

grounds, 398 U.S. 262, 90 S.Ct. 1578, 26 L.Ed.2d 221 (1970), a rape case. R 72.

Baldus became interested in methods of proportionality review and, together with four other scholars, published findings in the Stanford Law Review and the Journal of Criminal Law and Criminology. R 89. This was done on the basis of an analysis of some capital punishment data from California. R 81, et seg. Thereafter Baldus became a consultant to the National Center for State Courts and to the Supreme Court of South Dakota and the Supreme Court of Delaware. It is understood that his consulting work involved proportionality review. R 95. Baldus and Cole have also prepared an article for the Yale Law Journal evaluating statistical studies of the death penalty to determine if it had a deterrent effect. R 78. At the University of lows Baidus taught courses on scientific evidence, discrimination law, and capital punishment.

Baldus was qualified by the court as an expert on the legal and social interpretation of data, not on the issue of whether or not the statistical procedures were valid under the circumstances. While Baldus has some familiarity with statistical methodology, he was quick to defer to statistical experts where sophisticated questions of methodology were posed. See generally R 109-20.

Dr George Woodworth was called by the petitioner and qualified as an expert in the theory and application of statistics and statistical computation, especially with reference to analysis of discreet outcome data. Dr. Woodworth is an Associate Professor of Statistics at the University of lowa and collaborated with Baldus on the preparation of the study before the court. R 1193

The petitioner also called Dr. Richard A. Berk, a Professor of Sociology at the University of California at Santa Barbara, and he was qualified as an expert in social science research with particular emphasis on the criminal justice system. R 1749-53

X of the transcript, and that testimons will bereafter be referred to with the profix "X"

A separate one day hearing was had several months after the original hearing. The transcript of those proceedings appears in Volume

The respondents called two experts. One was Dr. Joseph Katz, an Assistant Professor at Georgia State University in the Department of Quantitative Methods. He was qualified as an expert in analyzing data, in research design, in statistics, statistical analysis and quantitative methods. R 1346. Dr. Katz is a rather recent graduate of Louisiana State University. The respondent also called Roger L. Burford, a Professor of Quantitative Business Analysis at LSU. He was Katz's mentor at the graduate level. Burford was qualified as a statistical expert. R 1627-32.

The court was impressed with the learning of all of the experts. Each preferred the findings and assumptions which supported his thesis, but it seemed to the court that no one of them was willing to disregard academic honesty to the extent of advancing a proposition for which there was absolutely no support.

## 2. Scope of the Studies

Baidus and Woodworth conducted two studies on the criminal justice system in Georgia as it deals with homicide and murder cases. The first is referred to as the Procedural Reform Study. The second is referred to as the Charging and Sentencing Study. R 121-122.

The universe for the Procedural Reform Study included all persons convicted of murder at a guilt trial. Also included were several offenders who pied guilty to murder and received the death penalty. The time period for the study included offenders who were convicted under the new Georgia death penalty statute which went into effect on March 28, 1973, and included all such offenders who had been arrested as of June 30, 1978. In the Procedural Reform Study no sample of the cases was taken and instead the entire universe was studied R 170-71. The data sources used by the researchers in the Procedural Reform Study were the files of the Georgia Supreme Court, certain information from the Department of Offender Rehabilitation. and information from the Georgia Department of Vital Statistics. R 175. et seq.

Except for the few pleas, the Procedural Reform Study focused only on offenders who had been convicted of murder at a trial. R 122. There were approximately 550 cases in the universe for the Procedural Reform Study.

The Procedural Reform Study began when Baidus developed a questionnaire and dispatched two students to Georgia in the fall of 1979. In 1980 the coders returned to Georgia and coded 264 cases on site. R 241-43. DB 28. DB 28A. As two different questionnaires were used, the researchers wrote a computer program which translated the data gathered from both questionnaires into one format. R 246.

Baldus made some preliminary studies on the data that he gathered in the Procedural Reform Study. He found in these preliminary analyses no "race of the defendant" effect and a very unclear "race of the victim" effect. R 258. The Legal Defense Fund learned of Baldus's research and retained him to conduct the second study. R 256. Baldus was of the opinion that it was critical to the validity of the study that the strength of the evidence be measured. R 262. Also, he felt it important to examine the combined effects of all the decisions made at the different levels of the criminal justice system. R 147. Accordingly, the design of the Charging and Sentencing Study was different in that it produced measurements in these two respects in addition to measuring factors akin to those which were already being taken into account in the Procedural Reform Stu-

The universe for the Charging and Sentencing Study was all offenders who were convicted of murder or voluntary manislaughter whose crimes occurred after March 28, 1973 and whose arrests occurred before December 21, 1978. This produced a universe of about 2500 defendants. R 123, 263-64. Any defendant who was acquitted or convicted of a lesser-included offense is not included in the study. R 264-

From the universe of the Charging and Sentencing Study a random stratified sample was drawn. The first stratification was by outcome. The researchers drew a 25% random sample of murder cases with life sentences and a 25% random sample of voluntary manslaughter cases. R 1216. To this sample, all death penalty cases were added. R 267-69. The second stratification was geographic. The researchers drew a sample of 18 cases from each judicial circuit in Georgia. Where the circuit did not produce 18 cases in the first draw, additional cases were drawn from the population to supplement the original random sample. The results from each judicial circuit were then weighted so that each circuit contributed to the total effect in proportion to the total number of cases it contributed to the universe. R 270.

Because of the many factors involved in such an analysis, a simple binomial comparison would show nothing. To determine whether or not race was being considered, it is necessary to compare very similar cases. This suggests the use of a statistical technique known as cross tabulation. Because of the data available, it was impossible to get any statistically significant results in comparing exact cases using a cross tabulation method. R 705. Accordingly, the study principally relies upon multivariate analysis

### 3. The Accuracy of the Data Base

As will be noted hereafter, no statistical analysis, much less a multivariate analysis, is any better than the accuracy of the database. That accuracy was the subject of much testimony during the hearing. To understand the issue it is necessary to examine the nature of the questionnaires utilized and the procedures employed to enter the data upon the questionnaires.

The original questionnaire for the Procedural Reform Study was approximately 120 pages long and had foils (blanks) for the entry of data on about 500 variables. DB 27. The first 14 pages of the questionnaire were filled out by the Georgia Department of Offender Rehabilitation for Professor Baldus. The remainder of the pages were coded by students in Iowa based on ex-

tracts prepared by data gatherers in Geor-

The data on the first 15 pages of the Procedural Reform Study questionnaire includes information on sentencing, basic demographic data concerning the defendant. his physical and psychiatric condition, his IQ, his prior record, as well as information concerning his behavior as an inmate. The next six pages of the questionnaire contained inquiries concerning the method of killing. Data is also gathered on the number of victims killed, information about coperpetrators, and the disposition of their cases, and pleadings by the defendant, Another eight pages of questions search out characteristics of the offense. Three pages are reserved for data on contemporaneous offenses, and another three pages for the victim's role in the crime and the defendant's behavior after the homicide There are additional pages on the role of co-perpetrators. There are more questions relating to the defense at trial and on the kinds of evidence submitted by the defendant. Then, there are 26 pages of questions concerning the deliberations of the jury and information concerning the penalty trial. The questionnaire concludes on matters relating to the disposition of the case with respect to other counts charged and, finally, the last page is reserved for the coder to provide a narrative summary of what occurred in the case. R 197-290, DB 27 This questionnaire also contained foils so that the coder could indicate whether or not the prosecutor or the jury was aware of the information being coded.

It is important to reiterate that this questionnaire was not coded by students having access to the raw data in Georgia. Instead, as noted above, two law students prepared detailed and transcribed. These notes, together with an abstract filled out by an administrative aide to the Georgia Supreme Court, and the opinion of the Georgia Supreme Court, were assembled as a file and were available in Iowa to the coders. R 209, 212, 241.

During the 1979-80 academic year, another questionnaire, simpler in form, was designed for use in obtaining data for the Procedural Reform Study. This questionnaire dropped the inquiries concerning whether the sentencing jury was aware of the aggravating and mitigating factors appearing in the files. R 230-31. Some of the questionnaires were coded in Georgia and some were coded in Iowa. Baldus developed a coding protocol in an effort to guide those who were entering data on the questionnaires. R 220-21, 227. The professional staff at the University of Iowa Computer Center entered the data obtained from the various Procedural Reform Study questionnaires into the computer.

Yet another questionnaire was designed for the Charging and Sentencing Study. The last questionnaire was modified in three respects. First, Baldus included additional queries concerning legitimate aggravating and mitigating factors because he had determined on the basis of his experience with earlier data that it was necessary to do so. Second, the questionnaire expanded the coverage of materials relating to prior record. Third, it contained a significant section on "strength of the evidence." R 274-77. After the new druft was produced and reviewed by several other academicians, it was reviewed by attorneys with the Legal Defense Fund. They suggested the addition of at least one other variable. R 275.

The Charging and Sentencing Study questionnaire is 42 pages long and has 595 foils for the recordation of factors which might, in Baldus's opinion, affect the outcome of the case. Generally, the kind of information sought included the location of the offense, the details of all of the charges brought against the offender, the outcome of the case, whether or not there was a plea bargain, characteristics of the defendant, prior record of the defendant, information regarding contemporaneous offenses. details concerning every victim in the case, characteristics of the offense, statutory aggravating factors, a delineation of the defendant's role vis-a-vis co-perpetrators' information on outcome of co-perpetrators

cases, other aggravating circumstances such as the number of shots fired, miscellaneous mitigating circumstances relating to the defendant or the victim, the defendant's defenses at the guilt trial, and the strength of the evidence. R 280-86. Again, all of these were categories of information which Baldus believed could affect the outcome of a given case.

A student who headed a portion of the data-gathering effort for the first study was placed in charge of five law students who were hired and trained to code the new questionnaires. R 308. This supervisor's name was Ed Gates.

The principal data source for the Charging and Sentencing study was records of the Georgia Department of Pardons and Paroles. This was supplemented with information from the Bureau of Vital Statistics and questionnaires returned from lawvers and prosecutors. Also, some information was taken from the Department of Offender Rehabilitation. R 293-94, DB 39 The records from the Department of Pardons and Paroles included a summary of the police investigative report prepared by a parole officer, an FBI rap sheet, a personal history evaluation, an admissions data summary sheet, and, on occasion, the file might contain a witness statement or the actual police report. R 347. The police report actually appeared in about 25 of the cases R 349 The Pardons and Paroles Board investigative summaries were always done after conviction.

Baidus and Gates again developed a written protocol in an attempt to assist coders in resolving ambiguities. This protocol was developed in part on past experience and in part on a case-by-case basis. R 239.

311. In the Charging and Sentencing Study the coders were given two general rules to resolve ambiguities of fact. The first rule was that the ambiguity ought to be resolved in a direction that supports the determination of the factfinder. The second rule is that when the record concerning a fact, is ambiguous the interpretation.

should support the legitimacy of the sentence. R 423, EG 4.

As to each foil the coder had four choices. The response could be coded as 1. showing that the factor was definitely present, or 2, which means that the file indicated the presence of the factor. If the factor was definitely not present, the foil was left blank. In cases where it was considered equally possible for the factor to be absent or present, the coder entered the letter "U." R 517. For the purpose of making these coding decisions, it was assumed that if the file indicated that a witness who would likely have seen the information was present or if, in the case of physical evidence, it was of the type that the police would likely have been able to view, and if such information did not appear in the Parole Board summaries, then the coder treated that factor as not being present. R 521

In addition to coding questionnaires the coders were asked to prepare brief summanes that were intended to highlight parts of the crime that were difficult to code. R

By the end of the summer of 1981 the questionnaires had been coded in Georgia and they were returned to lowa. R 585. All of the data collected had to be entered onto a magnetic tape, and this process was completed by the Laboratory for Political Research at the University of Iowa. R 595. That laboratory "cleaned" the data as it was keypunched; that is, where an impermissible code showed up in a questionnaire it was reviewed by a student coder who re-coded the questionnaire based upon a reading of Baldus's file. R 600-06.

After the data gathered for the Charging and Sentencing Study was entered on computer tapes, it was re-coded so that the data would be in a useful format for the planned analysis. The first step of the re-coding of the data was to change all 1 and 2 codes to 1, indicating that the factor was positively present. The procedure then re-coded all other responses as 0, meaning that the characteristic was not present. R 617-20

It appears to the court that the researchers attempted to be careful in that data-gathering, but, as will be pointed out hereafter, the final data base was far from perfect. An important limitation placed on the data base was the fact that the questionnaire could not capture every nuance of every case. R 239.

Because of design of earlier questionnaires, the coders were limited to only three special precipitating events. There were other questions where there were limitations upon responses, and so the full degree of the aggravating or mitigating nature of the circumstances were not captured. In these situations where there was only a limited number of foils, the responses were coded in the order in which the student discovered them, and, as a consequence, those entered were not necessarily the most important items found with respect to the variable. R 545. The presence or absence of enumerated factors were noted without making any judgment as to whether the factor was indeed mitigating or aggravating in the context of the case. R 384.

In the Charging and Sentencing Study as well, there were instances where there was a limit on the number of applicable responses which could be entered. For example, on the variable "Method of Killing," only three foils were provided. R 461, EG 6A, p. 14. The effect of this would be to reduce the aggravation of a case that had multiple methods of inflicting death. In coding this variable the students generally would list the method that actually caused the death and would not list any other contributing assaultive behavior. R 463

The information available to the coders from the Parole Board files was very summary in many respects. For example, on one of the completed questionnaires the coder had information that the defendant had told four other people about the murder. The coder could not, however, determine from the information in the file whether the defendant was bragging about the murder or expressing remorse. R 467-68. As the witnesses to his statements

were available to the prosecution and, presumably, to the jury, that information was knowable and probably known. It was not, however, captured in the study. The Parole Board summaries themselves were brief and the police reports from which the parole officers prepared their reports were typically only two or three pages long. R 1343.

0.

Because of the incompleteness of the Parole Board studies, the Charging and Sentencing Study contains no information about what a prosecutor felt about the credibility of any witnesses. R 1117. It was occasionally difficult to determine whether or not a co-perpetrator testified in the case. One of the important strength of the evidence variables coded was whether or not the police report indicated clear guilt. As the police reports were missing in 75% of the cases, the coders treated the Parole Board summary as a police report. R 493-94. Then, the coders were abie to obtain information based only upon their impressions of the information contained in the file. R 349

Some of the questionnaires were clearly mis-coded. Because of the degree of latitude allowed the coders in drawing inferences based on the data of the file, a recoding of the same case by the same coder at a time subsequent might produce a different coding. R 370, 386-87. Also, there would be differences in judgment among the coders. R 387.

Several questionnaires, including the one for McCleskey and for one of his co-perpetrators, was reviewed at length during the hearing. There were inconsistencies in the way several variables were coded for McCleskey and his co-perpetrator. R 1113. Res. 1. Res. 2.

The same difficulties with accuracy and consistency of coding appeared in the Charging and Sentencing questionnaires. For example, the Charging and Sentencing Study had a question as to whether or not the defendant actively resisted or avoided arrest. McCleskey's questionnaire for the Charging and Sentencing Study indicated that he did not actively resist or avoid

arrest. His questionnaire for the Procedural Reform Study indicated that he did. R 1129-30; Res. 2. Res. 4. Further, as noted above in one situation where it was undoubtedly knowable as to whether or not the defendant expressed remorse or bragged about the homicide, the factor was coded as "U." Under the protocol referred to earlier, if there was a witness present who could have known the answer and the answer did not appear in the file, then the foil is to be left blank. This indicates that the questionnaire, EG 6B, was not coded according to the protocol at foils 183 and 184.

To test the consistency of coding judgments made by the students. Katz tested the consistency of coding of the same factor in the same case as between the two studies as to 30 or so variables. There were 361 cases which appeared in both studies. Of the variables that Katz selected there were mis-matches in coding in all but two of the variables. Some of the mis-matches were significant and occurred within factors which are generally thought to be important in a determination of sentencing outcome. For example, there were mis-matches in 50° of the cases tested as to the number of death eligible factors occurring in the case. Other important factors and the percent of mis-matches are as follows:

Number of prior femous	3"
Immeriate Rage Motore	15
Execution Style Murder	IR
Unneressars Killing	10
Defendant Additional Chimes	76
Binotis	25
Defendant Drug History	25
Vietim Amusen Fear in the Defendant	19
Two or More Victimes in All	(40)
Vietim is a Stranger	12

B ....

Respondent's Exhibit 20A, R 1440, et seq.

A problem alluded to above is the way the researchers chose to deal with those variables coded "U". It will be recalled that for a variable to be coded "U" in a given questionnaire, there must be sufficient circumstances in the file to suggest the possibility that it is present and to preclude the possibility that it is not

present. In the Charging and Sentencing Study there are an average of 33 variables in each questionnaire which are coded as "U." The researcher: treated that information as not known to the decision-maker. R 1155. Under the protocol employed, the decision to treat the "U" factors as not being present in a given case seems highly questionable. The threshold criteria for assuming that a factor was not present were extremely low? A matter would not have been coded "U" unless there was something in the file which made the coder believe that the factor could be present. Accordingly, if the researchers wished to preserve the data and not drop the cases containing this unknown information, then it would seem that the more rational decision would be to treat the "L" factors as being present.

This coding decision pervades the data base. Well more than 100 variables had some significant number of entries coded "U". Those variables coded "U" in more than ten percent of the questionnaires are as follows (the sample size in the Charging and Sentencing Study is 1.084):

Plea Bargaining	445
Employment Status of the Defendant	2447
Vicum » Age	180
Occupational Status of the Victim	
Employment Status of the Victim	744
Defendant a Motive was Long-Termi Hate	204
Defendant's Motive was Revenue	2012
Defendant's Motive was Jeanous	1.30
Defendant's Motive was Immediate Rage	lel
Defendant - Motive was Racial	447
Dispute While under the Influence of	2.70
Vietam Mentai Defective	5.2
Victim Pregnant	27.71
Victim Defenseless due to Dispunity in Size or Numbers	2-24
Vietim Support Children	741
Victim Offered No Provocation	192
Homicide Planned for More than Five	41%
Execution-Style Homicide	7194
Victimi Pleaded for Life	791
Defendant Showed No Remove for Homicide	90.
Defendant Expressed Pleasure With	60"
Defendant Created Raw of Death to	1 0

Others	
Defendant Used Alcohol or Drugs	251
Before the Crime	
Effect of Airohol on the Defendant	220
Defendant Showed Remorse	913
Defendant Surrendered within 24 Hours	125
Victim Used Drugs or Alcohol Before	244
Effect of Drugs on Vieum	168
Victim Aroused Defendant's Fear for	220
Victim Armed with Deadly Weapon	155
History of Bad Blood Between Defendant and Victim	173
Victim Accused Defendant of	117 2.
Victim Physically Assaulted Defendant at Homicide	159
Victim Verbaily Threatened Defendant at Homicide	185
Victim Verbally Abused Defendant at Homicide	300
Victim Verbaily Threatened Defendant Earlier	100
Victim Verbuily Abused Defendant Earlier	156
Victim Had Bad Criminal Reputation	663
Victim had Criminal Record	946

A large number of other variables were coded "U" in more than five percent of the questionnaires. Race of the victim was unknown in 62 cases. Other variables which are often thought to explain sentencing outcomes and which were coded "U" in more than five percent of the questionnaires included:

THE STREET	
Inefendant + Motive was Sex	66
Defendant - Motive Science Witness for	***
Current Crime Piepute with Victims Defendant over	76
Mores Property	74
Victim Defenseiers due to Oki Age	63
Defendant Actively Resisted Arrest	67
Number of Vicums Killed by the Defendant	66
Defendant Conservated with Authorities	72
Defendant has History of Frug and Aleonal Aluse	79
Victim Physicads Injured Informati at Homicals	60
Vietim Physically Assaulted Defendant Earlis?	71

Many of the variables showing high rates of "U" codings were used in Baldus's models. For example, in Exhibit DB 83, models controlling for 13, 14 and 44 variables, respectively, are used in an effort to measure rucial disparities. In the 13-variable model, five of the variables have substantial numbers of "U" codes. In the 14-variable models of "U" codes.

el. seven variables are likewise affected. and in the 44-variable model, six were affected. Similar problems plagued the Procedural Reform Study Respondent's Exhibits 17A, 18A; DB 96A, DB 83, R 1429.

Because of the substantial number of "U" codes in the data base and the decision to treat that factor as not present in the case. Woodworth re-coded the "U" data so that the coding would support the outcome of the case and ran a worst case analysis on five small models. This had the effect generally of depressing the coefficients of racial disparity by as much as 25%. In the three models which controlled for a relatively small number of background variabies, he also re-computed the standard deviation based on his worst case analysis. In the two larger models on which he ran these studies, he did not compute the standard deviation, and in the largest model he did not even compute the racial coefficients after conducting the worst case analysis Accordingly, it is impossible for the court to determine if the coefficient for race of the victim remains present or is statistically significant in these larger order regressions. Both because of this and because the models used in the validating procedure were not themselves validated, it cannot be said that the coding decision on the "U data made no effect on the results obtained. See generally GW 4, Table 1.

In DB 122 and 123 Baldus conducts a worst case analysis which shows the resuits upon re-coding "U" data so as to legitimize the sentence. Baldus testified that the coding of unknowns would not affect the outcome of his analysis based on the experiments and these exhibits. The experiments do not, however, support his conclusion, and it would appear to the court that the experiments were not designed to support his conclusions. In DB 122 Baldus controls for only three variables, thence, it is impossible to measure the effect of any other variables or the effects that the recoding would have on the outcome. In DB 123 he utilizes a 39-variable model and concludes that on the basis of the re-coding it has no effect on the racial coefficients. Only five of the variables in the 39-variable

model have any substantial coding problems associated with them. (For these purposes the court is defining a "substantial problem" as a variable with more than 100 entries coded "U.") These five variables are the presence of a statutory aggravating factor B3 and B7D, hate, jealousy, and a composite of family, lover, liquor, or barroom quarrel. Baldus did not test any of his larger regressions to see what the effect would be. R 1701. et seq., DB 96A, Schedule 4, DB 122, DB 123, Res. Exh. 47A.

In addition to the questionable handling of the "U" codes, there were other factors which might affect the outcome of the study where information was simply unknown or unused. In the Charging and Sentencing Study data related with the responses. Other" was not used in subsequent analyses. In one factor, "special aggravating feature of the offense," there were 139 "Other" responses. R 1392, 1437.

Cases where the race of the victim was unknown were coded on the principle of imputation, as though the race of the victim was the same as the race of the defendant. R 1096.

There were 23 or 24 cases in the Procedural Reform Study and 62 or 63 cases in the Charging and Sentencing Study where the researchers did not know whether or not a penalty trial had been held. R 1522. Baldus, on the basis of the rate at which penalty trials were occurring in his other cases, predicted what proportion of these that probably proceeded to a penalty trial. The criteria for deciding precisely which of these cases proceeded to a penalty trial and which did not is unknown to the court. R 1101. It is not beyond possibility that the treatment of these 62 cases could have skewed the results. The data becomes important in modeling the prosecutorial decisions to seek a death sentence after there had been a conviction. Based on his sampie Baldus projects that something over 760 murder convictions occurred. If the 62 cases were proportionally weighted by a factor of 2.3 / 184 cases in the universe divided by 1084 cases in the sample equals 2.3), the effect would be the same as if he were missing data on 143 cases. Said another way, he would be missing data on about 18 to 20% of all of the decisions he was seeking to study. See generally R 1119.

The study was also missing any information on race of the victim where there were multiple victims. R 1146-47. Further, Baldus was without information on whether or not the prosecutor offered a plea bargain in 40% of the cases. R 1152. One of the strength of the evidence questions related to whether or not there was a credibility problem with a witness. Such information was available only in a handful of files. R 532-33. Further, the data would not include anything on anyone who was convicted of murder and received probation. R 186.

Multiple regression requires complete correct data to be utilized. If the data is not correct the results can be faulty and not reliable. R 1505-06. Katz urged that the most accepted convention in dealing with unknowns is to drop the observations from the analysis. R 1501-04. Berk opined that missing data seldom makes any difference unless it is missing at the order of magnitude of 30 to 45%. R 1766. This opinion by Berk rests in part upon his understanding that the missing data. whether coded "U" or truly missing was unknowable to the decision-maker. In the vast majority of cases this is simply not the C250

After a consideration of the foregoing, the court is of the opinion that the data base has substantial flaws and that the petitioner has failed to establish by a preponderance of the evidence that it is essentially trustworthy. As demonstrated above, there are errors in coding the questionnaire for the case sub judice. This fact alone will invalidate several important premises of petitioner's experts. Further, there are large numbers of aggravating and mitigating circumstances data about which is unknown. Also, the researchers are without knowledge concerning the deci-

sion made by prosecutors to advance cases to a penalty trial in a significant number of instances. The court's purpose here is not to reiterate the deficiencies but to mention several of its concerns. It is a major premise of a statistical case that the data base numerically mirrors reality. If it does not in substantial degree mirror reality, any inferences empirically arrived at are untrustworthy.

### 4. Accuracy of the Models

In a system where there are many factors which affect outcomes, an unadjusted binomial analysis cannot explain relationships. According to Baldus, no expert opinion of racial effects can rest upon unadjusted figures. R 731. In attempting to measure the effect of a variable of interest. Baldus testified that if a particularly important background variable is not controiled for, the coefficient for the variable of interest does not present a whole picture. Instead, one must control for the background effects of a variety of factors at once. One must, Baldus testified, identify the important factors in the system and control for them. R 694-95. Baidus aiso testified that a study which does not focus on individual stages in the process and does not control for very many background factors is limited in its power to support an inference of discrimination. R 146-47. Because he realized the necessity of controlling for all important background variables, he read extensively, consulted with peers, and from these efforts and from his prior analysis of data sets from California and Arkansus, he sought in his questionnaires to obtain information on every variable he believed would bear on the matter of death-worthiness of an individual defendant's case. His goal was to create a data set that would allow him to control for all of those buckground factors. R 194-95. 739. At this point it is important to emphasize a difference between the Procedural Reform Study and the Charging and Sentencing Study. The Procedural Reform Study contains no measures for strength of the evidence. Because Baldus was of the opinion that this could be a factor in whether or not capital punishment was imposed, information regarding the strength of the evidence was collected in the Charging and Sentencing Study. R 124, 286.

Baldus collected data on over 500 factors in each case. From the 500 variables he decided to select 230 for inclusion in further statistical analysis. R 659. He testified without further explanation that these 230 variables were the ones that he would expect to explain who received death sentences and who did not. R 661. X 631. Based on this testimony it follows that any model which does not include the 230 variables may very possibly not present a whole picture.

The 230 variable-mode! has several deficiencies. It assumes that all of the information available to the data-gatherers was available to each decision-maker in the system at the time that decisions were made. R 1122. This is a questionable assumption. To the extent that the records of the Parole Board accurately reflect the circumstances of each case, they present a retrospective view of the facts and circumstances. That is to say, they reflect a view of the case after all investigation is completed, after ail pretrial preparation is made, after all evidentiary rulings have been handed down, after each witness has testified, and after the defendant's defense or mitigation is aired. Anyone who has ever tried a lawsuit would testify that it is seldom and rare when at progressive stages of the case he knows as much as he knows by hindsight. Further, the file does not reflect what was known to the jury but only what was known to the police. Legal literature is rife with illustrations of information known reliably to the parties which they never manage to get to the factfinders. Consequently, the court feels that any model produced from the data base available is substantially flawed because it does not measure decisions based on the knowledge available to the decision-maker.

Beyond that defect, there are other reasons to distrust the 230-variable model or any of the others proposed by Baidus Statisticians have a method for measuring what portion of the variance in the dependent variable (here death sentencing rate) is accounted for by the independent variables included in the model. This measure is known as an adjusted #. The # values for a model which is perfectly predictive of changes in the dependent variable would have a value of 1.0. The r values for the models utilized by Woodworth to check the validity of his statistical techniques range from .15 to 39. The r' for the 230-variable model is between .46 and .48. The difference between the r value and 1 may be explained by one of two hypotheses. The first is that the other unaccounted-for factors at work in the system are totally random or unique features of individual cases that cannot be accounted for in any systematic way. The other theory is that the model does not model the system. R 1266-69. GW 4. Table 1. As will appear hereafter, neither Baidus nor Woodworth believes that the system is random.

In summary, the r measure is an indicia of how successful one has been with one's model in predicting the actual outcome of cases. R 1489. As the 230-variable model does not predict the outcome in half of the cases and none of the other models produced by the petitioner has an r even approaching .5, the court is of the opinion that none of the models are sufficiently predictive to support an inference of discrimination.

The regression equation, discussed in greater detail hereafter, postulates that the value of the dependent variable in a given case is the sum of the coefficients of all of the independent variables plus "U." In the equation the term "U" refers to all unique characteristics of an individual case that have not been controlled for on a system-wide basis. X 51-52. If the model is not appropriately inclusive of all of the systematic factors, then the "U" value will contain random influences as well as systematic influences. X 90. The ri value is a summary statistic which describes collectively all of the "U" terms.

Sometimes it is said that "U" measures random effects. Woodworth testified that

randomness does not necessarily reflect arbitrariness. He continued, The world really isn't random. When we say something is random, we simply mean it's unaccountable, and that whatever does account for it is unique to each case .... This randomness that we use is a tag that phenomena which are unpredictable on the basis of variables we have observed [sic]." R 1272-73. By implication this means that even in the 230-variable model it is unique circum: stances or uncontrolled-for variables which preponderate over the controlled-for variables in explaining death sentencing rates. This is but another way of saying that the models presented are insufficiently predictive to support an inference of discrimination.

None of the models presented have accounted for the alternative hypothesis that the race effects observed cannot be explained by unaccounted-for factors. This is further illustrated by an experiment that Katz conducted. He observed that when he controlled only for whether or not there had been a murder indictment and tried to predict the outcome based solely on the race of the victim, he obtained a regression coefficient of .07 which was statistically significant at the .000000000000000000005 level. He further observed that by the time Baldus had controlled for 230 variabies, the "P" value or test of statistical significance was only approximately .02. He stated as his opinion that the positive value of the race of the victim coefficient would not disappear because it was a convenient variable for the equation to use in explaining actual outcome where so many cases in the sample were white victim cases. It was his opinion, however, that

- The teaching of this chart has a universal lesson for courts. That lesson is that where there is a multitude of factors influencing the decision-maker, a court cannot rely upon tests of statistical significance to validate the data unless it is first shown that the statistical model is sufficiently predictive.
- Woodworth commented on this opinion of Katz's. He restified that it was his observation that after about ten variables were added to the model, the precipitous drop in levels of statistical significance leveled out, and, therefore, he

the race of the victim coefficient would become statistically insignificant with a model with a higher ra which better accounted for all of the non-racial variables including interaction variables and composite variables which could be utilized. R 1563-70. This methodical decline in statistical significance of the race of the victim and race of the defendant effects as more variables are controlled for is demonstrated graphically in Table 1 which is attached to the opinion as Appendix A.2 There, it will be observed that if an additional 20 background variables are added beyond the 230variable model and the data is adjusted to show the effect on death sentencing rates of appellate review, both the size of the coefficient for race of the victim and race of the defendant decreases by one-third. and the statistical significance decreases to .04 and .05, respectively."

Based on the evidence the court is unable to find either way with respect to Katz's hypothesis. From the evidence offered in support and in contradiction of the hypothesis, the court does learn one thing. It was said that one indication of the completeness of a model is when one can find no additional variables to add which would affect the results obtained. The work by Katz and Woodworth shows instability in the findings of the small order models utilized in the study, and, therefore, it is further evidence that they are not sufficiently designed so as to be reliable. See generally R 1729, Table 1, GW 6, Res. Exh. 24.

Based on all the foregoing, the court finds that none of the models utilized by the petitioner's experts are sufficiently predictive to support an inference of discrimination.

was of the opinion that it would require the addition of an enormous number of variables to make the coefficient insignificant. He had no opinion as to whether the addition of a number of variables would inevitably remove the effect. In fact, however, the trend line on GW 6 for statistical significance does not remain flateven in Woodworth's studies. From the 10 to 20-variable models to the 230-variable models, the "P" value declines from something just under 100003 to something just over 005.

#### 5 Multi-Colinearity.

23

As illustrated in Table 1, the petitioner introduced a number of exhibits which reflected a positive coefficient for the race of the victim and race of the defendant. The respondent has raised the question of whether or not those coefficients are in fact measuring racial disparities or whether the racial variables are serving as proxies for other permissible factors. Stated another way, the respondent contends that the Baldus research cannot support an inference of discrimination because of multipolinearity.

If the variables in an analysis are correlated with one another, this is called multicolinearity. Where this exists the coefficients are difficult to interpret. R 1166. A regression coefficient should measure the impact of a particular independent variable. and it may do so if the other variables are totally uncorrelated and are independent of each other. If, however, there is any degree of interrelationship among the variables, the regression coefficients are somewhat distorted by that relationship and do not measure exactly the net impact of the independent variable of interest upon the dependent variable. Where multi-colinearity obtains, the results should be viewed with great caution.

In the Charging and Sentencing Study a very substantial proportion of the variables are correlated to the race of the victim and to the death sentencing result. R 1141-42. All or a big proportion of the major nonstatutory aggravating factors and statutory aggravating factors show positive correlation with both the death sentencing result and the race of the victim. R 1142. More than 100 variables show statistically significant relationships with both death sentencing results and the race of the victim. R 1142. Because of this it is not possible to say with precision what, if any, effect the racial variables have on the dependent variable. R 1148, 1649. According to Baldus, tests of statistical signifi-

cance will not always detect errors in coefficients produced by multi-colinearity. R 1138, DB 92.

Katz conducted experiments which further demonstrated the truth of an observation which Baldus made: white-victim cases tend to be more aggravated while black-victim cases tend to be more mitigated Using the data base of the Procedural Reform Study. Katz conducted an analysis on 196 white-victim cases and 70 black-victim cases which had in common the presence of the statutory aggravating factor B2. Factor by factor, he determined whether whitevictim cases or black-victim cases had the higher incidence of each aggravating and mitigating factor. The experiment showed that there were 25 aggravating circumstances which appeared at a statistically significant higher proportion in cases involving one racial group than they did in the other. Of these 25 aggravating circumstances, 23 of these occurred in whitevictim cases and only 2 occurred in blackvictim cases. Likewise with mitigating factors it was determined that 12 mitigating factors appeared in a higher proportion of black-victim cases whereas only one mitigating feature appeared in a higher proportion of white-victim cases. The results of this latter analysis were also statistically significant. R 1472, et seg., Res Exh. 25 Similar or more dramatic results were obtained when the experiment was repeated with statutory factors B1. 3. 4. 7. 9 and 10 Res Exh. 29-34: R 1477-60.

As he had done with the data from the Procedural Reform Study. Katz conducted an analysis to discover the relative presence or absence of aggravating or mitigating circumstances in white and black-vicini cases, using the Charging and Sentencing Study data. Only aggravating or notigating circumstances shown to be significant at the 05 level were utilized. Unknown responses were not considered with out siight exception, each aggravating factor was present in a markedly high-

ann-farms

<sup>4.</sup> Katz utilized Buildus's characterization of factors as to whether they were aggravating or

er percentage of white-victim cases than in black-victim cases, and conversely, the vast majority of the mitigating circumstances appeared in higher proportions in black-victim cases. Res.Exh. 49, 50, R 1534-35. Similar observal in swere made with reference to cases discosed of by conviction of voluntary manslaughter. Res.Exh. 51, 52, R 1536.

Yet another experiment was conducted by Katz. He compared the death sentencing rates for killers of white and black victims at steps progressing upwards from the presence of no statutory aggravating circumstances to the presence of six such circumstances. At the level where there were three or four statutory aggravating circumstances present, a statistically significant race of the victim effect appeared. He then compared the aggravating and mitigating circumstances within each group and in each instance found on a factor-byfactor basis that there was a higher number of aggravating circumstances which occurred in higher proportions in white-victim cases and a number of mitigating factors occurred in higher proportions in black-victim cases. The results were statistically significant. Res Exh. 36, 37, R 1482.

All of the experts except Berk seemed to agree that there was substantial multi-colinearity in the data. Berk found rather little multi-colinearity R 1756 Woodworth observed that multi-colinearity has the effect of increasing the standard deviation of the regression coefficients, and he observed that this would reduce the statistical significance. According to Woodworth the net effect of multi-colinearity would be to dampen the effect of observed racial variables R 1279-82. He also testified that he had assured himself of no effect from multi-colinearity because they were able to measure the dispurities between white-victim and black-victim cases at similar levels of aggravation. For these two reasons Woodworth had the opinion that higher levels of aggravation in whitevictim cases were not relevant to any issue R 1297

The court cannot agree with Woodworth's assessment. He and Baldus seem to be at odds about whether tests of statistical significance will reveal and protect against results produced by multi-colinearity. His second point is also unconvincing. He contends that because he can measure a difference between the death sentencing rate in white-victim cases and black-victim cases at the same level of aggravation (and presumably mitigation), then the positive regression coefficients for this variable are not being produced by multi-colinearity. If Woodworth's major premise were correct: his conclusion might be tenable. The major premise is that he is comparing cases with similar levels of aggravation and mitigation. He is not. As will be discussed hereafter, he is merely comparing cases which have similar aggravation indices based on the variables included in the model. None of Woodworth's models on which he performed his diagnostics are large order regression analyses. Accordingly, they do not account for a majority either of aggravating or mitigating circumstances in the cases. Therefore, in the white-victim cases there are unaccounted-for systematic aggravating features, and in the black-victim cases there are unaccounted-for systematic mitigating features. As will be seen hereafter, aggravating factors do increase the death penalty rate and mrtigating factors do decrease, the death penalty. there are unaccounted-for aggravating or mitigating circumstances, white-victim cases become a proxy for aggravated cases, and black-victim cases become a proxy, or composite variable, for mitigating factors

The presence of multi-colinearity substantially diminishes the weight to be accorded to the circumstantial statistical evidence of racial disparity.

## E Petitioner's Best Case and Other Observations

Bused on what has been said to this point, the court would find that the petitioner has failed to make out a prima facre case of discrimination based either on race of the rictim or race of the defendant disparity. There are many reasons, the three most important of which are that the data base is substantially flawed, that even the largest models are not sufficiently predictive, and that the analyses do not compare like cases. The case should be at an end here, but for the sake of completeness, further findings are in order. In this section the statistical showings based on the petitioner's most complete model will be set out, together with other observations about the death penalty system as it operates in the State of Georgia.

Woodworth testified, "No, the system is definitely not purel; random. This system very definitely sorts people out into categories on rational grounds. And those different categories receive death 24 different rates." R 1277. An amaiysis of factors identified by Baldus as aggravating and mitigating, when adjusted to delete unknown values, gives a picture of a rational system when measured against case outcome. Virtually without exception, the presence of aggravating factors increases as the outcome moves from voluntary manslaughter to life sentence to death sentence. Conversely, factors identified by Baldus as being mitigating decrease in presence in cases as the outcome moves from voluntary manslaughter to life sentence to death sentence. R 1532 Res Exh. 48

These observations, other testimony by all of the experts, and the court's own analysis of the data put to rest in this court's mind any notion that the imposition of the death penalty in Georgia is a random event unguided by thought. The central question is whether any of the rationales for the imposing or not imposing of the death penalty are based on impermissible factors such as race of the defendant or race of the victim. In Baldus's opinion, based on his entire study, there are systematic and substantial disparities existing in the penalties imposed upon homicide defendants in the State of Georgia based on race of the homicide vic-

tim. Further, he was of the opinion that disparities in death sentencing rates do exist based on the race of the defendant, but they are not as substantial and not as systematic as is the case with the race of the victim effect. He was also of the opinion that both of these factors were at work in Fulton County. R 726-29. The court does not share Dr. Baldus's opinion to the extent that it expresses a belief that either of these racial considerations determines who receives the death penalty and who does not.

Petitioner's experts repeatedly testified that they had added confidence in their opinions because of "triangulation." That is, they conducted a number of different statistical studies and they all produced the same results. R 1061-82. This basis for the opinion is insubstantial for two reasons. First, many tests showed an absence of a race of the defendant effect or an absence of a statistically significant race of the defendant effect or a statistically insignificant modest race of the defendant effect running against white defendants. As will be seen below, the race of the victim effect observed, while more stent, did not always appear at a statistically significant level in every analysis. Second, Baldus's confidence is predicated upon a navigational concept, triangulation, which presumes that the several bearings being taken are accurate. The lore of the Caribbean basin s nich with tales of island communities supporting themselves from the booty of ships which have foundered after taking bearings on navigational aids which have been mischievously rearranged by the islanders. If one is going to navigate by triangulation, one needs to have confidence in the bearings that are being shot. As discussed earlier. Baldus is taking his bearings off of many models, none of which are adequately inclusive to predict outcomes with any regularity

Baidus has testified that his 280-variable model contains those factors which might best explain how the death penalty is imposed. The court, therefore, views results produced by that model as the most reliable.

evidence presented by the petitioner. Additionally, in some tables Baldus employed a 250-variable model which adjusted for death sentencing rate: after appellate review by Georgia courts. The race of the victim and race of the defendant effects, together with the "P" values, are shown in the table below.

#### TABLE 2

RACIAL EFFECTS TAKING INTO ACCOUNT ALL
DECISIONS IN THE SYSTEM - LARGE
SCALE REGRESSIONS
Workhold Leas Source Respective Results

#### Weighted Least Squares Regression Results Coefficients and Level of Statustical Significance

	230 Variable Model	
Race of the Victim		Race of Defendant
06		.06
(.02)		(.02)
	250 Variable Mode	
After Adjustm	ent for Georgia At	pellate Review
		Barrard Dafandani

In viewing Table 2, it is important to keep in mind that it purports to measure the net effect of the racial variables on all decisions made in the system from indictment forward. It shows nothing about the effect of the racial variables on the prosecutor's decision to advance a case to a penalty trial and nothing about the effect of the racial variables on the jury and its decision to impose the death penalty.

At this point it is instructive to know how Dr. Baldus interpreted his own findings on the racial variables. He says that the impact of the racial variable is small. R S31. The chances that anybody is going to receive a death sentence is going to depend on what the other aggravating and mitigating circumstances are in the case. R S2S. At another point Baldus testified that:

[t]he race of the victim in this seem is clearly not the determinant of what happened, but rather that it is a seem like a number of other factors, the plays a role and influences decision making. The one thing that's, that strained from working with these data for some time, there is no one factor that determined.

mines what happens in the system. If there were, you could make highly accurate predictions of what's going to happen. This is a system that is highly discretionary, highly complex, many factors are at work in influencing choice, and no one factor dominates the system. It's the result of a combination of many different factors that produce the results that we see, each factor contributing more or less influence.

R 813. And at another point Dr. Baidus interpreted his data as follows:

The central message that comes through a the race effects are concentrated in categories of cases where there's an elevated risk of a death sentence. There's no suggestion in this research that there is a uniform, institutional bias that adversely affects defendants in white victim cases in all circumstances, of a black defendant in all cases. There's nothing to support that conclusion. It's a very complicated system.

R 842.

Because of these observations, the testimony of other uninesses, and the court's own analysis of the data, it agrees that any racial variable is not determinant of who is going to receive the death penalty, and, further, the court agrees that there is no support for a proposition that race has any effect in any single case

An exhibit, DB 95, is produced in part in Table 3 below. It is perhaps the most significant table in the Baldus study. This table measures the race of the victim and the race of the defendant effect in the prosecutorial decision to seek the death sentence and in the jury sentencing decision to impose the death sentence. This is see of the few exhibits prepared by Baldus we ch utilizes data both from the Procedural deform Study and the Charging and Semencing Study. The first column shows to racial effects after controlling for 230 variables in the Charging and Sentencing Study and 200 variables in the Procedurul Reform Study

Controlling for All Factors in File

## McCLESKEY v. ZANT Cite to 580 F.Supp. 338 (1984)

## TABLE 3

REGRESSION COEFFICIENTS (WITH THE LEVEL OF STATISTICAL SIGNIFICANCE IN PARENTHESES) FOR RACIAL VARIABLES IN ANALYSES OR PROSECUTORIAL DECISIONS TO SEEK AND JURY DECISIONS TO IMPOSE CAPITAL PUNISHMENT

	* *			(230 variables in tencing Study:	(230 variables in Charging & Sen- tencing Study: 200 variables in Procedural Reform Study)	
1.	Protes		tor Decision to Seek a Death Sen	Regardless of Statistical Significant	If Statistically Significant at .10 Level	
	A.	Ra	ce of Victim		.18	
		1.	Charging and Sentencing Study	(.06)	(.0001)	
		2		12	(.0001)	
	B.	R	of Defendant		**	
		1.	Charging and Sentencing Study	(.42)	(.002)	
		2		01 (96)	(.41)	
11.	Je	ry S	entencing Decisions 1			
		R	ace of Victim Charging and	2	05 (37)	
		2	Sentencing Study Procedural Reform Study		.06 (.42)	
	B	. 3	lace of Defendant		- 04	
		1	Charging and Sentencing Study		(.42)	
		2	Procedural Reform Study		- 02	

3 Simultaneous adjustment for all factors in the files was not possible because of the limited number of penalty that decisions. (From DB 95)

tencing Study data base produce no statisti- been accepted as one which plays a large cally significant race of the victim effect either in the prosecutor's decision to seek the Procedural Reform data base shows a making, but that model is totally invalid for of the defendant has any statistically siz-

The coefficients produced by the 230- it contains no variable for strength of the variable model on the Charging and Sen- evidence, a factor which has universally part in influencing decisions by prosecutors. Neither model produces a statisticalthe death penalty or in the jury sentencing - ly significant race of the defendant effect decision. A 200-variable model based on at the level where the prosecutor is trying to decide if the case should be advanced to statistically significant race of the victim a penulty trial. Neither model produces effect at work on the prosecutor's decision- any evidence that race of the victim or face nificant effect on the jury's decision to impose the death penalty. The significance of this table cannot be overlooked. The death penalty cannot be imposed unless the prosecutor asks for a penalty trial and the jury imposes it. The best models which Baldus was able to devise which account to any significant degree for the major non-racial variables, including strength of the evidence, produce no statistically significant evidence that race plays a part in either of those decisions in the State of Georgia.

The same computations were repeated using only factors which were statistically significant at the .10 level.\* The court knows of no statistical convention which would permit a researcher arbitrarily to exclude factors on the basis of artificial criteria which experience and other research have indicated have some influence on the decisions at issue. The fact that a variable may not be statistically significant is more likely a reflection of the fact that it does not occur often, and not any sort of determination that when it does occur it lacks effect. Accordingly, the second model, set out in Table 3, does not meet the criterion of having been validated by someone knowledgeable about the inner workings of the decision-making process.

The results in the second column are reproduced here because they demonstrate some other properties of the research. It is noted first that the race of the victim effect is lower in the Procedural Reform Study than in the Charging and Sentencing Study. As the Procedural Reform Study represents a universe of all cases and the Charging and Sentencing Study is a random sample, one possible explanation for the disparity in magnitude might be that the sampling techniques utilized in the Charging and Sentencing Study somehow overestimated the coefficients. Another in-

8. As an aside, the court should think that this table should put to rest the son of sucreotypical prejudice against Southern jurisdictions typified in the petitioner's brief by reliance on evidence in the Congressional Record in the 1870's concerning the existence of a disregard by Southern officials for the value of black life.

teresting observation from this study is that even when the data is artificially manipulated, no statistically significant race of the victim or race of the defendant effect appears at the jury decision level. Last, this table demonstrates a property of the analyses throughout regarding race of the defendant. To the extent that race of the defendant appears as a factor, it sometimes appears as a bias against white defendants and sometimes appears as a bias against black defendants: very often, whatever bias appears is not statistically significant.

Finally, this table is an illustration of a point which the court made earlier. At the beginning, in assessing the credibility of the witnesses, the court noticed that all seemed to have something of a partisan bias. Thereafter, it noted that the results of certain diagnostics respecting the worst case analysis in Woodworth's work were not reported in the exhibits given the court. Here, in this table, we are given no outcomes based on the larger scaled regressions for the racial variables at the jury sentencing level. It is said that the data was not provided because it was not possible to conduct simultaneous adjustment for all factors in the file because of the limited number of penalty trial decisions. From all that the court has learned about the methods employed, it does not understand that the analysis was impossible, but instead understands that because of the small numbers the results produced may not have been statistically significant.

The figures on racial disparities in prosecutorial and jury decision-making do not reflect the effects of racini disparities that might have resulted in earlier phases of the system. R 933. A stepwise regression analysis of the statewide data in the Charging and Sentencing Study was done in an effort to measure the race of the victim and race of the defendant effects at different stages

The regression coefficient of an independent variable would be the same regardless of whether erit was a rare event or a frequent event. X 33



of the procedure from indictment through the imposition of the death penalty." This regression analysis suggested that there is an increased willingness by prosecutors to accept pleas to voluntary manslaughter if the race of the victim is black. R 1062-68. DB 117. This suggests a possibility that the racial effects observed in Table 2 may be the result of bias at a plea bargaining stage." This is not established by the evidence, and it is immaterial to this case, for Baidus did not believe that McCleskey's case would have had any likelihood of being disposed of on a voluntary manslaughter plea. R 1064-65. Baidus noted that there were strong effects with respect to both race of the defendant and race of the victim at the plea bargaining level. R 1040. It is to be remembered that on this point his data base was far from complete Finally, it is noted that this study did not attempt to discern if any of the racial disparities noted at the plea bargaining stages could be explained by any of the current theories on the factors governing pies bargaining R 1159-63.

7. What a Multivariate Regression Can Prove

Before one can begin to utilize the resuits of the Baidus study, whether from the larger order regressions or from the small models, an understanding of the techniques employed is necessary. Such an understanding produced in the court's mind other qualifiers which at least in this case substantially diminish the weight of the evidence produced.

Regression analysis is a computational procedure that describes how the average outcome in a process, here the death sentencing rate, is related to particular charac-

7. Siepwise regression is a process carried out by a computer which selects the background variables sequentially based on which provides the best fit. It makes no judgment as to whether or not the variables it selects might in reality have anything to do with the decision. Any model produced by siepwise regression would not meet the legal statistical conventions discussed earlier in that the model is not validated by a person who is by experience or learning acquainted with how the process actually works.

teristics of the cases in the system. least squares regression coefficient displays the average difference in the death penalty rate across all cases caused by the independent variable of interest. In a regression procedure one may theoretically measure the impact of one variable of interest while "controlling" for other independent variables. Conceptually, the coefficient of the variable of interest is the numerical difference in death sentencing rates between all cases which have the variable of interest and all cases which do not. R 689, et seq., 1222-23. The chief assumption of a weighted least square regression is that the effect of the variable of interest is consistent across all cases Woodworth testified that that assumption was not altogether warranted in this case ! That the variable of interest, here race of the victim, is not the same against all cases. is graphically seen in a preliminary cross tabulation done by Baldus. In this experiment, cases which were similar in that they had a few aggravating and mitigating factors in common were grouped into four subgroups. The race of the victim disparaty ranged from a low of .01 through .04 to .15 and finally to .25. The weighted least squares regression coefficient for these same cases was .09 R 181, DB 16. DB TT

Statistical significance is another term which the court and the parties used regularly. This term connotes a test for rival hypotheses. There is a possibility that an effect could be present purely by chance or by the chance combination of bad luck in drawing a sample or by chance combination of events in the charging and sentencing process that may produce an actidental disparity which is not systematic. Statistically, the charging and sentencing process that may produce an actidental disparity which is not systematic.

- McCleskey was offered a life senience in return for a guilty plea. (See State Habeas Transcript. Testimony of Turner).
- He resulted however that the data was interpretable because he convinced himself that the violations of the assumption were not in themselves responsible for the indings of significant racial effects. B 1223-24, 1228.

cal significance computes the probability that such a disparity could have arisen by chance, and, therefore, it tests the rival hypothesis that chance accounts for the results that were obtained. R 1244-45. Tests of statistical significance are a measure of the amount by which the coefficient exceeds the known standard deviation in the variable, taking into account the size of the sample. Considering the values used in this study, a statistical significance at the .05 level translates into a two-standard deviation disparity, and a statistical significance at the .01 level approaches a threestandard deviation level. R 1246-47. R 712-17. As noted earlier a low "P" value. a measure of statistical significance, does not, at least in the case of multi-variate analysis, assure that the effect observed by any one model is in fact real.

The use of regression analysis is subject to abuse. Close correlations do not always say anything about causation. Further, a regression analysis is no better than the data that went into the analysis. It is possible to obtain a regression equation which shows a good statistical fit in the sense of both low "P" values and high r values where one has a large number of variables, even when it is known in advance that the data are totally unrelated to each other. R 1636-37.

What the regression procedure does by algebraic adjustment is somewhat comparable to a cross tabulation analysis. It breaks down the cases into different subcategories which are regarded as having characteristics in common. The variable of interest is calculated for each sub-category and averaged across all sub-categories. R 791-99

The model tries to explain the dependent variable by the independent variables that it is given. It does this by trying to make the predicted outcome the same as the actual outcome in terms of the factors that it is given. R 1487-88. For example, if a regression equation were given ten independent variables in a stagewise process, it would guess at the regression coefficient for the first variable by measuring the continuous scale R 1454. It is important

incremental change in the dependent variable caused by the addition of cases containing a subsequent independent variable. X 29. After the initial mathematical computation, the equation then goes back and re-computes the coefficients it arrived at earlier, using all of the subsequent regression coefficients that it has calculated. It continues to go through that process until coefficients which best predict actual outcome are arrived at for each variable. X 43-46.

By its nature, then, the regression equation can produce endless series of self-fulfilling prophecies because it always attempts to explain actual outcomes based on whatever variables it is given. If, for example, the data base included information that of the 128 defendants who received the death penalty, 122 of them were nighthanded, the regression equation would show that the system discriminated against right-handed people. This is so because that factor occurs so often that it is the most "obvious" or "easy" explanation for the outcomes observed. In the case at bar. there are 108 white-victim cases where death was imposed and 20 black-victim cases where death was imposed. DB 63. Accordingly the regression coefficients for the racial variables could have been artificially produced because of the high incidence of cases in which the victim was

Another feature of Baldus's analyses is that he is trying to explain dichotomous outcomes (life or death) with largely dichotomous independent variables (multiple stabbing present or not present and a regression equation requires continuous dependent and independent variables. Accordingly. Baldus developed indices for the dependent variable (whether or not the death penalty was imposed). He utilized an average rate for a group of cases. For the independent variables he developed an artificial measure of similarity called an aggravation index to control simultaneously for aggreening and mitigating circumstances so that cases could be ranked on a pared in the regression analyses used here are not at all factually similar. Their principal identity is that their aggravation index, the total of all positive regression coefficients minus all negative regression coefficients, is similar. X 14-15. The whole study rests on the presumption that cases with similar aggravation indexes are similarly situated. R 1311. This presumption is not only rebuttable, it is rebutted, if by nothing else, then by common sense. As Justice Holmes observed in Towne v. Eisner, 245 U.S. 418, 38 S.Ct. 158, 62 L.Ed. 372 (1918):

A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used. ld. at 425. 38 S.Ct. at 360, quoting Lamar v. United States, 240 U.S. 60, 65, 36 S.Ct. 255, 256, 60 L.Ed. 526 (1916). The same thought, it seems to the court, is apropos for the aggravation index. It allows a case with compelling aggravating circumstances, offset only by a series of insignificant mitigating circumstances, to be counted as equal to a case with the same level of aggravation and one substantial mitigating factor having the same numerical value as the series of trifling ones in the first case. The court understands that strength of the evidence measures generally are positive coefficients. To the extent that this is true, a strong evidentiary case with weak aggravating circumstances would be considered the same as a brutal murder with very weak evidence. Other examples abound, but the point is that there is no logical basis for the assumption that cases with similar aggravation indices are at all alike. Further, the aggravation index for any given case is a function of the variables that are included in the model. Any change in the variables included in the model will also change the aggravation index of most, if not all, cases.

The variability of the aggravation index as factors are added or deleted is well demonstrated by Respondent's Exhibit 40. One case comparison will serve as an exam-

to understand that the cases being com- pie. In a life sentence case, C 54, an aggravation index (or predicted outcome index. R 1485) was computed using a six-variable model. Calculation produced an index of .50. Katz conducted four additional regressions, each adding additional factors. By the time the more inclusive regression number five was performed, the aggravation index or predicted outcome was .08 (0 equals no death penalty, 1 equals death penalty). In a death case, C 66, the first regression analysis produced an index of .50. However, the aggravation coefficient or predicted outcome rose to .89 when the facts of the case were subjected to the fifth regression analysis. Thence, two cases which under one regression analysis appeared to be similar, when subjected to another analysis may have a totally different aggravation index. Res.Exh. 40. R 1483-1501

In interpreting the Baldus data it is important to understand what he means when he says that he has controlled for other independent variables or held other individual variables constant. What these terms usually mean is that a researcher has compared cases where the controlled-for variables are present in each case and where the cases are divided into groups where the variable of interest is present and where the variable of interest is not present That is not what occurs in regression and ysis. To be sure, the cases are divided into groups where the variable of interest is present and groups where it is not present There is, however, absolutely no assurance that the background variables being controiled for are present in all of the cases in any of the cases or present in the same combination in any of the cases. Consequently, other factors are not being held constant as that term is usually used. Sec. generally R 152, X 7, 19-25

Courts are accustomed to looking at figures on racial disparts and understanding that the figure indicates the extent or degree of the disparity. It is often said that statistical evidence cannot demonstrate discrimination unless it snows gross dispurties. Contrary to the usual case the court

has learned that at least in this case the size of a regression coefficient, even one statistically significant at the .05 level, says nothing about the specific degree of disparity or discrimination in the system. All the regression coefficient indicates is that the difference in average outcome where the racial variable is present from cases where it is not present is large enough to enable one to say that the true mean of both groups are not exactly equal. R 1635. 1670-71. Baldus made an effort to demonstrate the relative importance of the racial variables by showing them in an array of coefficients for other variables. The court later learned, however, that where some of the variables are binary or dichotomous and some are continuous (for example, number of mitigating features present). one cannot use the size of the regression coefficient as an indication of the relative strength of one variable to another. R 1783

Consistent with the difficulty in quantifying the effect of any variable found to be at work in the system. Baldus testified that a regression analysis really has no way of knowing what particular factors carry the most weight with the decision-maker in any one case R 1141. Based on his entire analysis Baldus was unable to quantify the effect that race of the victim may have had in McCleskey's case. R 1083-85. After a review of the Baldus study. Berk was unable to say whether McCleskey was singled out to receive the death penalty because his victim was white, nor was he able to say that McCleskey would have excaped the death penalty if his victim had been black Berk went on to testify

Models that are developed talk about the effects on the average. They do not depict the experience of a single individual. What they say, for example, that on the average, the race of the victim, if it is unite, increases on the average the probability... (that) the death sentence would be given.

Whether in a given case that is the auswer, it cannot be determined from statistics. R 1785

In summary, then. Baldus's findings from the larger scale regressions or from any of the others must be understood in light of what his methods are capable of showing. They do not compare identical cases, and the method is incapable of saying whether or not any factor had a role in the decision to impose the death penalty in any particular case. A principal assumption which must be present for a regression analysis to be entirely reliable is that the effects must be randomly distributed—that is not present in the data we have. The regression equation is incapable of making qualitative judgments and, therefore, it will assign importance to any feature which appears frequently in the data without respect to whether that factor actually influences the decision-maker. Regression analysis generally does not control for background variables as that term is usually understood, nor does it compare identical cases. Because Baldus used an indez method, comparable cases will change from model to model. The regression coefficients do not quantitatively measure the effect of the variables of interest.

With these difficulties, it would appear that multivariate analysis is ill suited to provide the court with circumstantial evidence of the presence of discrimination. and it is ineapable of providing the court with measures of qualitative difference in treatment which are necessary to a finding that a prima facir case has been established with statistical evidence Finully the method is incumbie of producing evidence on whether or not racial factory pingerl a part in the imposition of the death penaity in any particular case To the estent that McCleskey contends that he was denied either due process or equal protection of the law, his methods faci to contribute anything of calar to his

## A Rebutul to the Hypothesis

A part of Baidus's hypothesis is that the system places a lower value on black life than on white life. If this is true it would mean that the system would tolerate higher levels of aggravation in black victim cases before the system imposes the death penalty.

The respondent postulates a test of this thesis. It is said that if Baldus's theory is correct, then one would necessarily find aggravation levels in black-victim cases where a life sentence was imposed to be higher than in white-victim cases. This seems to the court to be a plausible corollary to Baldus's proposition. To test this corollary, Katz, analyzing aggravating and mitigating factors one by one, demonstrated that in life sentence cases, to the extent that any aggravating circumstance is more prevalent in one group than the other. there are more aggravating features in the group of white-victim cases than in the group of black-victim cases. Conversely, there were more mitigating circumstances in which black-victim cases had a higher proportion of that circumstance than in white-victim cases. R 1510-15, 1540. Res. Exh. 43, 53, 54.

Because Katz used one method to demonstrate relative levels of aggravation and Baldus used another, his index method, the court cannot say that this experiment alone conclusively demonstrates that Baldus's theory is wrong. It is, however, direct rebuttal evidence of the theory, and as such, stands to contradict any prima facte case of system-wide discrimination based on race of the victim even if it can be said that the petitioner has indeed established a prima facte case. This court does not believe that he has.

 Miscellaneous Observations on the Stateunde Data

So that a reader may have a better feeling of subsidiary findings in the studies and a better understanding of collateral

10. One thing of interest came out in DB 60 concerning the evaluation of the coders. In their judgment 92% of all the police reports that they studied indicated clear guilt. This is interesting in view of the fact that only 95% of all defendants tried for murder were convicted. This suggests either that the coders did not have.

issues in the case, some additional observations are presented on Baldus's study.

Some general characteristics of the sample contained in the Charging and Sentencing Study which the court finds of interest are as follows. The largest group of defendants was in the 18 to 25-year-old age group. Only ten percent had any history of mental illness. Only three percent were high status defendants. Only eight percent of the defendants were from out of state. Females comprised 13% of the defendants. Of all the defendants in the study 35% had no prior criminal record. while 65% had some previous conviction. Co-perpetrators were not involved in 79% of the cases, and 65% of the homicides were committed by lovers in a rage. High emotion in the form of hate, revenge, jealousy or rage was present in 66% of the cases. Only one percent of the defendants had racial hatred as a motive. Victims provoked the defendant in 48% of the cases. At trial 26% confessed and offered no defense. Self defense was claimed in 33% of the cases, while only two percent of the defendants relied upon insanity or delusional compulsion as a defense. Defendants had used alcohol or drugs immediately prior to the crime in 38% of the cases. In only 24% of the cases was a killing planned for more than five minutes. Intimate associates, friends, or family members accounted for 44% of the victims. Black defendants accounted for 67% of the total, and only 12% of the homicides were committed across rucial lines. The largest proportion (58%) of the homicides were committed by black defendants against black victims. R 659. et seg. DB 60 1

From the data in the Charging and Sentencing Study it is learned that 94% of all homicide indictments were for murder. Of those indicted for murder or manslaughter 55% did not plead guilty to voluntary man-

enough experience to make this evaluation, or the more likely explanation is that the Parole Board summaries were obtained from official channels and only had the police version and had little if any gloss on the weaknesses of the case from the defendant's perspective. slaughter. There were trials for murder in 45% of the cases and 31% of the universe was convicted of murder. In only ten percent of the cases in the sample was a penalty trial held, and in only five percent of the sample were defendants sentenced to death. DB 58, R 64-65. See also DB 59, R 655.

In his analysis of the charging and sentencing data. Baldus considered the effect of Georgia statutory aggravating factors on death sentencing rates, and several things of interest developed. The statutory aggravating circumstances are highly related or correlated to one another. That is to say that singularly the factors have less impact than they do in combination. Even when the impact of the statutory aggravating circumstances is adjusted for the impact of the presence of others, killing to avoid arrest increased the probability of a death sentence by 21 points, and committing a homicide during the course of a contemporaneous felony increased the probability of getting the death penalty by 12 points. R 709-11, DB 68. Where the B6 and B10 factors are present together. the death penalty rate is 39%. DB 64 Based on these preliminary studies one might conclude that a defendant committing a crime like McCleskey's had a greatly enhanced probability of getting the death penalty

Of the 125 death sentences in the Charging and Sentencing Study population, 105 of those were imposed where the homicide was committed during the course of an enumerated contemporary offense. Further, it is noted that the probability of obtaining the death penalty is one in five if the B2 factor is present, a little better than one in five if the victim is a policeman or fireman, and the probability of receiving the death penalty is about one in three if the homicide was committed to avoid ar-

11. Part of the moral force behind petitioner's contentions is that a civilized society should not tolerate a penalty system which does not avenge the murder of black people and white people alike. In this connection it is interesting to note that in the highest two categories of aggravation there were only ten cases where the murderer. rest. These, it is said, are the three statutory aggravating factors which are most likely to produce the death penalty, and all three were present de facto in McCleskey's case. DB 61.

When the 500 most aggravated cases in the system were divided into eight categories according to the level of the aggravation index, the death penalty rate rose dramatically from 0 in the first two categories. to about 7% in the next two, to an average of about 22% in the next two, to a 41% rate at level seven, and an 88% rate at level eight. Level eight was composed of 58 cases. The death sentencing rate in the 40 most aggravated cases was 100%. DB 90. R 882. Baldus felt that data such as this supported a hypothesis arrived at earlier by other social science researchers. This theory is known as the liberation hypothesis. sis. The postulation is that the exercise of discretion is limited in cases where there is little room for choice. If the imposition of the death penalty or the convicting of a defendant is unthinkable because the evidence is just not there, or the aggravation is low, or the mitigation is very high, no reasonable person would vote for conviction or the death penalty, and, therefore, impermissible factors such as race effects will not be noted at those points. But, according to the theory, when one looks at the cases in the mid-range where the facts do not clearly call for one choice or the other, the decision-maker has broader freedom to exercise discretion, and in that area you see the effect of arbitrary or impermissible factors at work. R 884. R 1135.17

Baldus did a similar rank order study for all cases in the second data base. He divided the cases into eight categories with the level of aggravation increasing as the category number increased. In this analysis he controlled for 14 factors, but the record does not show what those factors were

of a black victim did not receive the death penalty while in eleven cases the death penalty under similar circumstances was imposed. This is not by any means a sophisticated statistical analysis, but even in its simplicity it paints no picture of a systematic deprecation of the value of black life. The experiment showed that in the fir five categories the death sentencing rate was less than one percent, and there was no race of the victim or race of the defendant disparity observed. At level six and nine statistically significant race of the victim disparities appeared at the 9 point and 27 point order of magnitude. Race of the defendant disparities appeared at the last three levels, but none were statistically significant. A minor race of the victim disparity was noted at level 7 but the figure was not significant. The observed death sentencing rates at the highest three levels were two percent, three percent, and 39% DB 89. Exhibit DB 90 arguably supports Baldus's theory that the liberation hypothesis may be at work in the death penalty system in that it does show higher death sentencing rates in the mid-range cases than in those cases with the lowest and highest aggravation indices. On the other hand. Exhibit DB 89, which, unlike DB 90 is predicated on a multiple regression analysis, shows higher racial disparities in the most aggravated level of cases and lower or no racial disparities in the mid-range of aggravation. Accordingly, the court is unable to find any convincing evidence that the liberation hypothesis is applicable in this study

Baldus created a 39-variable model which was used for various diagnostics. It was also used in an attempt to demonstrate that given the facts of McCleskey's case, the probability of his receiving the death penality because of the operation of impermissible factors was greatly elevated. Although the model is by no means acceptable, 12 it is necessary to understand what is

12. This model has only one strength of the exidence factor (DCONFESS) and that occurs only
in 26 percent of the cases. Many other aggravating and mitigating circumstances which the
court has come to understand are significant in
explaining the operation of the system in Georgia are omitted. Among these are that the
homicide arose from a fight or that it was committed by lovers in a rage. A variable for family, lover, liquor, barroom quarrec is included,
and it might be argued that this is a proxy.
However, the court notes from DB 60 that the
included variable occurs in only 1246 cases
whereas the excluded variable (MADLOVER)

and is not shown by the model, as it is a centerpiece for many conclusions by petitioner's experts. On the basis of the 39variable model McCleskey had an aggravation score of .52. Woodworth estimated that at McCleskey's level of aggravation the incremental probability of receiving the death penalty in a white-victim case is between 35 and 23 percentage points. R 1294-156-40, GW 5, Fig. 2. If a particular aggravating circumstance were left out in coding McCleskey's case, it would affect the point where his case fell on the aggravation index. R 1747. Judging from the testimony of Office Evans. McCleskey showed no remorse about the killing and to the contrary, bragged about the killing while in jail. While both of these are variables available in the data base, neither is utilized in the model. If either were included it should have increased McCleskey's index if either were coded correctly on McCleskey's questionnaire. Both variables on McCleskey's questionnaire were coded as "U." and so even if the variables had been included. McCleskey's aggravation index would not have increased because of the erroneous coding. If the questionnaire had been properly encoded and if either of the variables were included. McCleskey's aggravation index would have increased. although the court is unable to say to what degree. Judging from GW 9, if that particular factor had a coefficient as great as 15. the 39-variable or "mid-range" model would not have demonstrated any disparity in sentencing rates as a function of the race of the victim.

Katz conducted an experiment aimed at determining whether the uncertainty in

occurs in 1,601 cases. Therefore, the universe of cases is not coextensive. Others which are excluded are variables showing that the victim was forced to disrobe, that the victim was found without clothing that the victim was mutilated, that the defendant killed in a rage, that the killing was unnecessary to carry but the contemporaneous felony: that the defendant was provoked; that the defendant lacked the intent to kill, that the defendant resisted arrest, and that the victim verbally provoked the defendant that the victim verbally provoked the defendant.

sentencing outcome in mid-range could be the result of imperfections of the model. He arbitrarily took the first 100 cases in the Procedural Reform Study. He then created five different models with progressively increasing numbers of variables. His six-variable model had an r of .26. His 31-variable model had an r2 of .95.13 Using these regression equations he computed the predictive outcome for each case using the aggravation index arrived at through his regression equations. As more variables were added, aggravation coefficients in virtually every case moved sharply toward 0 in life sentence cases and sharply toward 1 in death sentence cases. Respondent's Exhibit 40. In the five regression models designed by Katz. McCleskey's aggravation score, depending on the number of independent variables included. was .70, .75, 1.03, .87, and .85. R 1734. Res.Exh. 40.

Based on the foregoing the court is not convinced that the liberation hypothesis is at work in the system under study. Further, the court is not communed that system generally that it would suggest that impermissible factors entered into the decision to impose the death penalty upon McCleskey.

On another subject. Baldus testified that in a highly decentralized decision-making system it is necessary to the validation of a study to determine if the effects noted system-wide obtain when one examines the decisions made by the compartmentalized decision-makers. R 964-69. An analysis was done to determine if the racial disparities would persist if decisions made by urban decision-makers were compared with decisions made by rural decision-makers.14 No statistically significant race of the victim or race of the defendant effect was observed in urban decision-making units. A .08 effect, significant at the .05 level.

was observed for race of the victim in rural decision-making units, but when logistic regression analysis was used, the effect became statistically insignificant. The race of the defendant effect in the rural area was not statistically significant. The decisions in McCleskey's case were made by urban decision-makers.

Finally, the court makes the following findings with reference to some of the other models utilized by petitioner's experts. As noted earlier some were developed through a procedure called stepwise regression. What stepwise regression does is to acreen the variables that are included in the analysis and include those variables which make the greatest net contribution to the r. The computer program knows nothing about the nature of those variables and is not in a position to evaluate whether or not the variable logically would make a difference. If the variables are highly correlated, the effect quite frequently is to drop variables which should not be dropped from a subject matter or substantive point of view and keep variables in that make no even if the hypothesis was at work in the seense conceptually. So, stepwise regression can present a very misleading picture through the presentation of models which have relatively high r' and have significant coefficients but which models do not really mean anything. R 1632. Because of this the court cannot accord any weight to any evidence produced by the model created by stepuise regression.

Woodworth conducted a number of tests on five models to determine if his measures of statistical significance were valid. As there were no validations of the models he selected and none can fairly be said on the basis of the evidence before the court to model the criminal justice system in Georgia. Woodworth's diagnostics provide little if any corroboration to the findings produced by such models. R 1252, et seq. GW 4. Table 1

<sup>13.</sup> Katz testified that in most cases he randomly selected variables and in the case of the 31-variable model selected those variables arbitrarily which would most likely predict the outcome in McCleskey's case

<sup>14.</sup> Based on the court's knowledge of the State of Georgia, it appears that Baldus included many distinctly rural jurisdictions in the category of urban jurisdictions.

In Exhibits DB 96 and DB 97, outcomes which indicate racial disparities at the level of prosecutorial decision-making and jury decision-making are displayed. At the hearing the court had thought that the column under the Charging and Sentencing Study might be the product of a model which controlled for sufficient background variables to make it partially reliable. Since the hearing the court has consulted Schedule 8 of the Technical Appendix (DB 96A) and has determined that only eleven background variables have been controlled for, and many significant background variables are omitted from the model. The other models tested in DB 96 and 97 are similarly under-inclusive. (In this respect compare the variables listed on Schedule 8 through 13. inclusive, of the Technical Appendix with the variables listed in DB 59.) For this reason the court is of the opinion that DB 96 and DB 97 are probative of nothing

#### 10. The Fulton County Data.

McCleskey was charged and sentenced in Fuiton County, Georgia.15 Recognizing that the impact of factors, both permissible and impermissible, do vary with the decision-maker, and recognizing that some cases in this circuit have required that the statistical evidence focus on the decisions er's experts conducted a study of the effect of racial factors on charging and sentencing in Fulton County.

The statistical evidence on the impact of racial variables is inconclusive. If one controis for 40 or 50 background variables. multiple regression analysis does not produce any statistically significant evidence of either a race of the defendant or race of the victim disparity in Fulton County. R 1000 Ealdus used a stepwise regression analysis in an effort to determine racial disparities at different stages of the criminal justice system in the county. The stepwise regression procedure selected 23 vari-

15. As part of its findings on the Fulton County data, the court finds that there are no guidetines in the Office of the District Attorney of the Atlanta Judicial Circuit to guide the exercise of

ables. Baldus made no judgment at all concerning the appropriateness of the variables selected by the computer. The study indicated a statistically significant race of the victim and race of the defendant effect at the plea bargaining stage and at the stage where the prosecutor made the decision to advance the case to a penalty trial. Overall, there was no statistically significant evidence that the race of the victim or race of the defendant played any part in who received the death penalty and who did not. As a matter of fact, the coefficients for these two variables were very modestly negative which would indicate a higher death sentencing rate in black-victim cases and in white-defendant cases. Neither of the coefficients, however, approach statistical significance. R 1037-49.

The same patterns observed earlier with reference to the relative aggravation and mitigation of white and black-victim cases. respectively, continue when the Fulton County data is reviewed. In Fulton County, as was the case statewide, cases in which black defendants killed white victims seemed to be more aggravated than cases in which white defendants killed white victims. R 1554, 1361, Res.Exh. 68

Based on DB 114 and a near neighbor where the sentence was imposed, petition." analysis Baldus offered the opinion that in cases where there was a real risk of a death penalty one could see racial effects R 1049-50 DB 114 is statistically inconclusive so far as the court can determine The cohort study or near neighbor analysis also does not offer any support for Buldus's opinion. Out of the universe of cases in Fulton County Buldus selected 32 cases that he felt were near neighbors to McCleskey. These ran the gambit from locally notorious cases against Timothy Wes McCorquodale Juck Carlton House, and Marcus Wayne Chennault to cases that were clearly not as appravated as McCleskey's case Baldus then divided these 32

> discretion in determining whether or net to seek a penalty inial. Further it was established that there was only one black jurge on McCle-ket sjury. R 1316

cases into three groups: More aggravated equal to McCleskey, and less aggravated.

The court has studied the cases of the cohorts put in the same category as McCleskey and cannot identify either a race of the victim or race of the defendant disparity. All of the cases involve a fact pattern something like McCleskey's case in that the homicides were committed during the course of a robbery and in that the cases involve some gratuitous violence, such as multiple gunshots, etc. Except in one case, the similarities end there, and there are distinctive differences that can explain why either no penalty trial was held or no death sentence was imposed.

As noted above. Dr. Baidus established that the presence of the B10 factor, that is that the homicide was committed to stop or avoid an arrest, had an important predictive effect on the imposition of the death penalty. Also the fact that the victim was a police officer had some predictive effect Keeping these thoughts in mind, we turn to a review of the cases Defendant Thornton's case (black defendant black victimi) did not involve a police officer. Further Thornton was very much under the influence of drugs at the time of the humicide and had a history of a "distinct alcohol problem." In Dillard's case (black defendant black victims the homicide was not necessary to prevent an arrest and the victim was not a police officer. Further Dillard's prior record was less serious than McCleskey's. In Leach's case black defendant black vietims the homicide was not committed to preventian arrest and the victim was not a police officer Further. Leach had only one prior felony and that was for motor vehicle theft. Leach went to thal and went through a penalty thal Nowhere in the coder's summary is there any information available on Leach's defense or on any evidence of mitigation offered

In the case of Gantt Iblack defendant white victimi the homicide was not committed to avoid an arrest and the victimi was not a police officer. Further, Gantt relied on an insanity defense at trail and had only one prior conviction. Crouch's penalty trials. McCleskey's involved a

case (white defendant/white victim) did not involve a homicide committed to prevent an arrest and the victim was not a police officer. Crouch's prior record was not as severe as McCleskey's and, unlike McCleskey. Crouch had a prior history of treatment by a mental health professional and had a prior history of habitual drug use. Further, and importantly, the evidence contained in the summary does not show that Crouch caused the death of the victim.

Arnold is a case involving a black defendant and a white victim. The facts are much the same as McCleskey's except that the victim was not a police officer but was a storekeeper. Arnold's case is aggravated by the fact that in addition to killing the victim, he shot at three bystander witnesses as he left the scene of the robbery, and he and his co-perpetrators committed another armed robbery on that day. Arnold was tried and sentenced to death. Henry s case (black defendant/white victim) did not involve a homicide to escape an arrest or a police victim. Henry's prior record was not as serious as McCleskey's, and, from the summary, it would appear that there was no direct evidence that the defendant was the truggerman, nor that the State considered him to be the triggerman.

In sum, it would seem to the court that Arnold and McCleskey's treatments were proportional and that their cases were more aggravated and less mitigated than the other cases classified by Baldus as cohorts. This analysis does not show any effect based either upon ruse of the defendant or ruce of the victim. See generally R. 983-30, DB 110.

Another type of conort analysis is possible using Futton County data. There were it defendants charged in connection with the killing of a police officer since Future in Six of those in Baldus's opinion were equally aggravated to McCleskey's case. Four of the cases involved a black defendant killing a white officer, two involved a black defendant killing a black officer and one involved a white defendant killing a white officer. There were two penalty trials. McCleskey's involved a

black defendant killing a white officer: the other penalty trial involved a black defendant killing a black officer. Only McCleskey received a death sentence. Three of the offenders pied guilty to murder, and two went to trial and were convicted and there was no penalty trial. On the basis of this data and taking the liberation hypothesis into account. Baldus expressed the opinion that a racial factor could have been considered, and that factor might have tipped the scales against McCleskey. B 1051-56, DB 116. The court considers this opinion unsupported conjecture by Baldus.

## D. Conclusions of Law

Based upon the legal premises and authorities set out above the court makes these conclusions of law.

[25] The petitioner's statistics do not demonstrate a prima facie case in support of the contention that the death penalty was imposed upon him because of his race. because of the race of the victim, or because of any Eighth Amendment concern. Except for analyses conducted with the 230-variable model and the 250-variable model, none of the other models relied upon by the petitioner account to any substantial degree for racially neutral variables which could have produced the effect observed The state-wide data does not indicate the likelihood of discriminatory treatment by the decision-makers who sought or imposed the death penalty and the Fulton County data does not produce any statistically significant evidence on a validated model nor any anecdotal evidence that race of the victim or race of the defendant played any part in the decision to seek or impose the death penalty on McCleskey

The data base for the studies is substantially flawed, and the methodology utilized is incapable of showing the result of racial variables on cases similarly situated. Further, the methods employed are incapable of disclosing and do not disclose quantitatively the effect, if any, that the two suspect racial variables have either state-wide, county-wide or in McCleskey's case. Ac-

cordingly, a court would be incapable of discerning the degree of disparate treatment if there were any. Finally, the largest models utilized are insufficiently predictive to give adequate assurances that the presence of an effect by the two racial variables is real.

Even if it were assumed that McCleskey had made out a prima facie case, the respondent has shown that the results are not the product of good statistical methodology and, further, the respondent has rebutted any prima facie case by showing the existence of another explanation for the observed results, i.e., that white victim cases are acting as proxies for aggravated cases and that black victim cases are acting as proxies for mitigated cases. Further rebuttal is offered by the respondent in its showing that the black-victim cases being left behind at the life sentence and voluntary manslaughter stages, are less aggravated and more mitigated than the whitevictim cases disposed of in similar fashion.

Further, the petitioner has failed to carry his ultimate burden of persuasion. Even in the state-wide data, there is no consistent statistically significant evidence that the death penalty is being imposed because of the race of the defendant. A persisent race of the victim effect is reported in the state-wide data on the basis of experiments performed utilizing models which do not adequately account for other neutral variables. These tables demonstrate nothing When the 230-variable model is utilized, a race of the victim and race of the defendant effect is demonstrated. Wifen all of the decisions made throughout the process are taken into account it is theorized but not demonstrated that the point in the system at which these impermissible considerations come into play is at plea bargaining The study, however is not geared to nor does it attempt to control for other neutral variables to demonstrate that there is unfairness in plea bargaining with black defendants or killers of white victims. In any event, the petitioner's study demonstrates that at the two levels of the system that matter to him, the decision to seek the

death penalty and the decision to impose the death penalty, there is no statistically significant evidence produced by a reasonabiv comprehensive model that prosecutors are seeking the death penalty or juries are imposing the death penalty because the defendant is black or the victim is white. Further, the petitioner concedes that his study is incapable of demonstrating that he, specifically, was singled out for the death penalty because of the race of either himself or his victim. Further, his experts have testified that neither racial variable preponderates in the decision-making and. in the final analysis, that the seeking or the imposition of the death penalty depends on the presence of neutral aggravating and mitigating circumstances. For this additional reason, the court finds that even accepting petitioner's data at face value, he has failed to demonstrate that racial considerations caused him to receive the death penalty

For these, smong other reasons the court denies the petition for a writ of habeas corpus on this issue.

# III. CLAIM "A"—THE GIGLIO CLAIM.

Petitioner asserts that the failure of the State to disclose an "understanding" with one of its key witnesses regarding pending criminal charges violated petitioner's due process rights. In Giglio v United States, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1971) the Supreme Court stated:

As long ago as Mooney 1: Holohan, 294 U.S. 103, 112 [55 S.Ct. 340, 341, 79 L.Ed. 791] (1935); this Court made clear that deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with "rudimentary demands of justice." This was reaffirmed in Pyle 1: Kansos, 317 U.S. 213 [63 S.Ct. 177, 87 L.Ed. 214] (1942). In Napue 1: Illinois, 360 U.S. 254 [79 S.Ct. 1173, 3 L.Ed.2d 1217] (1950), we said. "[t]he same result obtains when the State although not soliciting false evidence, allows it to go uncorrected when it appears." Id., at 269 [79 S.Ct. at

1177] Thereafter Brady v. Maryiand.
373 U.S. [83], at 87 [83 S.Ct. at 1194, 10 L.Ed.2d 215], held that suppression of material evidence justifies a new trial "irrespective of the good faith or bad faith of the prosecution." See American Bar Association, Project on Standards for Criminal Justice. Prosecution Function and the Defense Function § 3.11(a). When the "reliability of a given witness may well be determinative of guilt or innocence," nondisclosure of evidence affecting credibility falls within this general rule. 405 U.S. 150, 153-54, 92 S.Ct. 763, 765-66, 31 L.Ed.2d 104.

In Giglio an Assistant United States Attornev had promised leniency to a co-conspirator in exchange for his testimony against defenuant. However, the Assistant U.S. Attorney who handled the case at trial was unaware of this promise of leniency and argued to the jury that the witness had received no promises that he would not be indicted." The Supreme Court held that neither the Assistant's lack of authority nor his failure to inform his superiors and associates was controlling. The prosecution's duty to present all material evidence to the jury was not fulfilled and thus constituted a violation of due process requiring a new trial. Id. at 150, 92 S.Ct. at 760

[26] It is clear from Giglio and subsequent cases that the rule announced in Giglio applies not only to traditional deals made by the prosecutor in exchange for testimony but also to any promises or understandings made by any member of the prosecutorial team, which includes police investigators. See United States v Autone, 603 F 2d 366, 369 (5th Cir 1979) Giglio analysis held to apply to understanding between investigators of the Florida Department of Criminal Law Enforcement and the witness in a federal prosecution) The reason for giving Giglio such a broad reach is that the Giglio rule is designed to do more than simply prevent prosecutoriai misconduct. It is also a rule designed to insure the integrity of the truth-seeking process. As the Fifth Circuit stated in United States v Caules, 42: F 2d 702 (5th Cir 1973). "[w]e read Gigito and [United States v.] Tashman and Goldberg (sic) [478 F 2d 129 (5th Cir., 1973)] to mean simply that the jury must be apprised of any promise which induces a key government witness to testify on the government's behalf." Id. at 707. More recently, the Eleventh Circuit has stated:

The thrust of Giglio and its progeny has been to ensure that the jury know the facts that might motivate a witness in giving testimony, and that the prosecutor not fraudulently conceal such facts from the jury. We must focus on "the impact on the jury." Smith v. Kemp, 715 F.2d 1459, 1467 (11th Cir.1983) (quoting United States v. Anderson, 574 F.2d 1347. 1356 (5th Cir.1978)).

In the present case the State introduced at petitioner's trial highly damaging testimony by Offie Gene Evans, an inmate of Fulton County Jail, who had been placed in solitary confinement in a cell adjoining petitioner's. Although it was revealed at trial that the witness had been charged with escaping from a federal halfway house, the

- 16. On direct examination the prosecutor asked Q: Mr. Evans have I promised you anything
  - for testifying today
  - No. sir. you ain t You do have an escape charge still pend
  - ing, is that correct? Yes, sir I've got one, but really it ain i no escape, what the propies out there tell me because something went wrong out there so I just went home. I staved at home and when I cailed the man and told him that I would be a little late coming in, he placed me on escape charge and told me there wash't no use of me coming back and I just stayed on at home and he come and picked me up.
  - Q: Are you hoping that perhaps you won t be
  - prosecuted for that escape? A. Yesh, I hope I don't, but I don't-what they tell me, they ain't going to charge me with escape no way
  - Have you asked me to try to fix it so you Qwouldn't get charged with excape?

  - O Have I told you I would try to fix it for

  - Trial Transcript at 868
  - On cross-examination by peritioner's trial counse! Mr. Evans resulted
  - Now were you attempting to get 0 0435 your escape charges altered or at least worked out, were you expecting your testinions to be beipful in that?

witness denied that any deals or promises had been made concerning those charges in exchange for his testimony 18 The jury was clearly left with the impression that Evans was unconcerned about any charges which were pending against him and that no promises had been made which would affect his credibility. However, at petitioner's state habeas corpus hearing Evans tesufied that one of the detectives investigating the case had promised to speak to federal authorities on his behalf.17 It was further revealed that the escape charges pending against Evans were dropped subsequent to McCleskey's trial.

- [27] After hearing the testimony, the habeas court concluded that the mere e. parte recommendation by the detective did not trigger the applicability of Giglio This, however, is error under United States v. Antone. 603 F 2d 366, 369 .5th Cir 1979) and cases cited therein. A promme, made prior to a witness a testimony that the investigating detective will speak
  - 4. I wasn't worrying about the escape charge I wouldn't have needed this for that charge there wash I no escape charge
  - Q. Those charges are still pending against you, aren; they?
  - A Yeah the charge is pending against the but I aim i been before no Grand Jury in BOIDING INC IPSI BOT VEL
  - Trus 7 and op 31 980
  - 17. At the harvas hearing the following rate spired
    - The Court Mr Evans ic mit ask you a qui iton. At the time that you testified in Mr McClerker's man had rou been promoted and thing in exchange for your testimon.
      The Wittens So I wasn't I wasn't promised: nothing about -1 same promised withing by the DA But the Detecting told the Buil he would be said to was going to do it home. If speak a word for the That was what the speak a word for me Derective told in
      - By Mr Serven The Detective find you that he resided
      - smak a wind for you?
    - Q That was Described the said
    - A Year Hanserin at 122

favorably to federal authorities concerning pending federal charges is within the scope of Giglio because it is the sort of promise of favorable treatment which could induce a witness to testify falsely on behalf of the government. Such a promise of favorable treatment could affect the credibility of the witness in the eyes of the jury. As the court observed in United States v. Bar-Aam. 595 F.2d 231 (5th Cir.1979), cert. demied. 450 U.S. 1002. 101 S.Ct. 1711. 68 L.Ed.2d 205, the defendant is "entitled to a jury that, before deciding which story to credit, was truthfully apprised of any possible interest of any Government witness in testifying falsely." Id. at 243 (emphasis in

A finding that the prosecution has given the witness an undisclosed promise of favorable treatment does not necessarily warrant a new trial, however. As the Court observed in, Giglio.

We do not, however, automatically require a new trial whenever "a combing of the prosecutors' files after the trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict .. " United States v. Keogh, 391 F.2d 138, 148 (C.A. 2 1968). A finding of materiality of the evidence is required under Brady, supra, at 87. A new trial is required if "the false testimony could . in any reasonable likelihood have affected the judgment of the 405 U.S. at 154, 92 S.Ct. at 112777 266

In United States v. Anderson, 574 F.2d 1347 (5th Cir.1978), the court elaborated upon the standard of review to be applied in cases involving suppression of evidence impeaching a prosecution witness:

 In his closing argument to the jury the prosecutor developed the malice argument:

He (McCleskey) could have gotten out of that back door just like the other three did, but he chose tool to do that, he chose too go the other way, and just like Offic Evans savs, it doesn't make any difference if there had been a dozen policemen cor . In there, he was going to shoot his way out. He didn't have to do that he could have run out the side entrance he could have given up, he could have concealed

The reviewing court must focus on the impact on the jury. A new trial is necessary when there is any reasonable likelihood that disclosure of the truth would have affected the judgment of the jury, that is, when there is a reasonable likelihood its verdict might have been different. We must assess both the weight of the independent evidence of guilt and the importance of the witness' testimony, which credibility affects. Id. at 1356. In other cases the court has examined the extent to which other impeaching evidence was presented to the jury to determine

extent to which other impeaching evidence was presented to the jury to determine whether or not the suppressed information would have made a difference. E.g., United States v. Antone. 603 F 2d 566 (5th Cir.1979).

In the present case the testimony of Evans was damaging to petitioner in several respects. First, he alone of all the witnesses for the prosecution testified that McCleskey had been wearing makeup on the day of the robbery. Such testimony obviously helped the jury resolve the contradictions between the descriptions given by witnesses after the crime and their incourt identifications of petitioner Second. Evans was the only witness, other than the codefendant. Ben Wright, to testify that McCleskey had admitted to shooting Officer Schlatt. No murder weapon was ever recovered. No one saw the shooting Aside from the damaging testimony of Wright and Evans that McCleskey had admitted the shooting, the evidence that McCleskey was the triggerman was entirely circumstantial. Finally, Evans' testimony was by far the most damaging testimony on the issue of malice 1x

[28] In reviewing all of the evidence presented at trial, this court cannot con-

himself like he said he tried to do under one of the couches and just hid there. He could have done that and let them find him, here I am peckaboo.

He deliberately killed that officer on purpose. I can gives what his purpose was 1 am sure you can gives what it was too. He is going to be a big man and kill a police officer and get was with it. That is maken.

away with it. That is malice. Trial Transcript at 974-75 clude that had the jury known of the promise made by Detective Dorsey to Offie Evans, that there is any reasonable likelihood that the jury would have reached a different verdict on the charges of armed robbery Evans's testimony was merely cumulative of substantial other testimony that McCleskey was present at the Dixie Furniture Store robbery. However, given the circumstantial nature of the evidence that McCleskey was the triggerman who killed Officer Schlatt and the damaging nature of Evans's testimony as to this issue and the issue of malice, the court does find that the jury may reasonably have reached a different verdict on the charge of malice murder had the promise of favorable treatment been disclosed. The court's conclusion in this respect is bolstered by the fact that the trial judge, in charging the jury as to murder, instructed the jury that they could find the defendant guilty of either malice murder or felony murder After approximately two hours of deliberation, the jury asked the court for further instructions on the definition of malice Given the highly damaging nature of Evans's testimony on the issue of malice there is a reasonable likelihood that dischsure of the promise of favorable treatment to Evans would have affected the judgment of the jury on this issue "

As the Fifth Circuit observed in United States in Barbain, 305 F.2d 201 Gth Carecest deviced, 450 U.S. 1002, 101 S.Ct. 171, 68 L.Ed.2d 205 (1061), another case according circumstantial evidence hoisisterial the testimony of a witness to whom an undisclosed promise of favor-line treatment had been given.

There is no doubt that the evidence in this case was sufficient to support a ver-

19. Although persistence has min made this alignment, the court notice in passing that Examinestimons at trial regarding the executivations of his escape varies markedly from the focus appearing in the records of federal pressure as their ties. For example, the records assist has been as had been using executive and opinion the records assist had been using executive and opinion times had been formed as the person techniques and the passing captured Elans took authorities. I had been in Formed working under the drug executive and drug executive and provided the proposition.

dict of guilty. But the fact that we would sustain a conviction untainted by the faise evidence is not the question. After all, we are not the body which, under the Constitution, is given the responsibility of deciding guilt or innocence. The jury is that body, and, again under the Constitution, the defendant is entitled to a jury that is not laboring under a Government-sanctioned false impression of material evidence when it decides the question of guilt or innocence with all its ramifications.

We reiterate that credibility was especially important in this case in which two sets of witnesses-all alleged particle pants in one or more stages of a criminal enterprise-presented irreconcilable stones. Barnam was entitled to a jury that, before deciding which story to credit was truthfully apprised of any possible interest of any Government witness in testilving faisely Knowledge of the Government's promises to Joey Shaver and Dune and Jerry Beech would have given the jury a concrete reason to behe've that those three witnesses might have functional testimony in order to avoid prosecution themselves or minimize the anverse consequences of prosecu-And the subsequent failure of the Concernment to correct the faise impressur given by Shaver and the Beeches she det from jury consideration per another, more persuasive reason to doubt their testimony-the very fact that they has attenue to give the jury a faire impression concerning promises from the Concernment. In this case, in which creddulit we ghed so heavily in the balance we cannot conclude that the jury had it last given a specific reason to discretifi

Join 25 1982. These lasts available to the points of the control of the second of the

the testimony of these key Government witnesses, would still have found that the Government's case and Barham's guilt had been established beyond a reasonable doubt. Id. at 242-43 (emphasis in original).

Because disclosure of the promise of favorable treatment and correction of the other faisehoods in Evans' testimony could reasonably have affected the jury's verdict on the charge of malice murder, petitioner's conviction and sentence on that charge are unconstitutional.<sup>20</sup> The writ of habeas corpus must therefore issue.

## IV CLAIM "C"-THE SANDSTROM

Positioner claims that the trial court's insuructions to the jury deprived him of due

- 20. Nothing the court ways in this part of the opinion is meant to imply that peritioner's confinement for consecutive life sentences on his armed robbery convictions is unconstitutional. The court holds only that the conviction and sentence for murder are unconstitutional.
- The relevant portions of the trial court's jury instructions are set forth below. The portions to which pertioner objects are underlined.

Now the defendant enters upon the trial of this case, of all three charges set forth in the indictment, with the presumption of innocence in his behalf, and that presumption remains with him throughout the trial of the case unless and until the State introduces endence proxing the defendants guilt of one or more or all of the charges beyond a reasonable doubt.

The burden resis upon the state to prove the case by proxing the maternal allegations of each count to your satisfaction and become a reasonable doubt. In determining whether or not the state has carried that burden you would consider all the evidence that has been introduced here before you during the trial of this case.

Now in every criminal prosecution, ladies and genilemen, criminal intent in a necessary and materials ingredient thereof. To put it differently, a criminal intent is a material and necessary ingredient in any criminal prosecution.

I will now try to explain what the law means by criminal intent by reading you two sections of the criminal code dealing with intent and I will tell you how the last section applies to you the jury.

One see on of our law says that the acts of

process because they unconstitutionally relieved the prosecution of its burden of proving beyond a reasonable doubt each and every essential element of the crimes for which defendant was convicted. Specifically, petitioner objects to that portion of the trial court's charge which stated:

One section of our law says that the acts of a person of sound mind and discretion are presumed to be the product of the person's will, and a person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts, but both of these presumptions may be rebutted.<sup>27</sup> Trial Transcript at 996.

[29,30] It is now well established that the due process clause "protects the accused against conviction except upon proof

presumed to be the product of the person's will and a person of sound mind and discretion is presumed to michal the natural and probable consequences of his acts. But pout of these presumptions may be rebuilted.

I charge you however, that a person will not be presumed to act with criminal intention, but the second code section says that the trier of facts may find such intention upon consideration of the words, conduct, demeanor motive and all other circumstances connected with the act for which the accused is prosequited.

Now that second code section I have read you as the term the tree of facts. In this case, ladies and gentlemen, you are the trier of facts and therefore it is fur you, the jurn to determine the question of facts solely from your determination as to whether there was a criminal insultion on the pair of the defendant considering the facts and circumstances as disclosed by the evidence and deductions which might reasonably be drawn from those facts and circumstances.

Now the offense charged in Count One of the indictment is murder and I will charge you what the law says about murder

I charge you that a person commits murder when he untawfully and with matter afore thought, either express or implied, causes the death of another human being. Express matter is that deliberate intention to take away the life of a fellow creature which is manifested by extential circumstances capable of proof. Matter shall be implied when no considerable providences of the killing show an abandance and matignant heart. That is the language of the law, fadies and gentienter.

beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In Re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). Jury instructions which relieve the prosecution of this burden or which shift to the accused the burden of persuasion on one or more elements of the crime are unconstitutional. Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979); Mullaney v. Wilbur, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975).

(31) In analyzing ". Sandstrom claim the court must first examine the crime for which the petitioner has been convicted and then examine the complained of charge to determine whether the charge unconstitutionally shifted the burden of proof on any essential element of the crime. See Lamb v. Jernigan, 683 F.2d 1332, 1335-36 (11th Cir.1982), cert. denied. — U.S. ——, 103 S.Ct. 1276, 75 L.Ed.2d 496 (1983). If the reviewing court determines that a reasona-

In legal contemplation a man may form the intention to kill a human being, do the killing instantly thereafter, and regret the deed 2-soon as it is done. In other words, murdu, is the intentional killing of a human being without justification or mitigation.

Trial Transcript, 988, 996–97, 998–99.

22. Whether a Sandstrom error can be held to be harmless remains an open question at this time. The Supreme Court expressiv left open in Sandstrom the question of whether a burden-shifting jury instruction could ever be considered harmless. 442 U.S. at 520-27, 99 S.C. at 2400-61. The courts of this circuit have held that where the Sandstrom error is harmless beyond a resonable doubt a reversal of the conviction is not warranted. See, e.g., Lamby . Jernigar, 883 F.2d. 1332, 1342-43 (11th Cir. 1982). In Connecticut v. Johnson. U.S. 103 S.Cl. 969, 74 L.B.2.d 823 (1983), the Supreme Court granted certiorari to resolve the question of whether a Sandstrom error could ever be considered harmless. Four Justices specifically held that the test of harmlessness employed by this cir cutti-whether the evidence of guilt was so overwheelming that the erroneous instruction could not have contributed to the jury's verdict—was

ble juror would have understood the instruction either to relieve the prosecution of its burden of proof on an essential element of the crime or shift to the defendant the burden of persuasion on that element the conviction must be set aside unless the reviewing court can state that the error was harmless beyond a reasonable doubt. Lamb v. Jernigan. supra; Mason v. Balkcom. 669 F.2d 222 (5th Cir. Unit B 1982). cert. denied. — U.S. —, 103 S.Ct. 1260. 75 L.Ed.2d 487 (1983).

[32-34] Petitioner was convicted of armed robbery and malice murder. The offense of armed robbery under Georgia law contains three elements: (1) A taking of property from the person or the immediate presence of a person. (2) by use of an offensive weapon. (3) with intent to commit theft.<sup>23</sup> The offense of murder also contains three essential elements: (1) A homicale: (2) malice aforethought, and (3) unlawfulness.<sup>23</sup> See Lamb v. Jernigan, su-

inappropriate. Id. 103 S.Ct. at 977. However, an equal number of justices dissented from this holding. Id. at 979 [Powell, I.] joined by Burg. et. C.J. Rehnquist Powell, I.] joined by Burg. et. C.J. Rehnquist and O'Connor. IJ. dissenting). The tie-breaking vote was east by Justice Stevens who concurred in the judgment on jurisdictional grounds. Id. at 978 (Stevens. J. concurring in the judgment).

Because a majority of the Supreme Court had not declared the harmiess error standard om ployed in this circuit to be erronedus, the Elementh Circuit has continued to hold that Sandstrom errors may be analyzed for harmiessness. See Spenior 1. Zant. 715 F.2d 15e2 111th Cir. 1983.

- 23. Georgia Code Ann. § 26-1902 (now codified at OCCA § 16-5-1) provides in pertinent part.
  - (a) A person commits armed robbers, when with intent to commit theft, he takes property of another from the person or the immediate presence of another by use of an offensive weapon.
- 24. Georgia Code Ann. § 26-1101 inow codified at OCGA § 16-1-11 defines the offense of in order as follows:
  - (a) A person commiss the offense of muracrahen he un twitely and with malice alone thought either express or implied, cause the death of another human being
  - the fispress mance is that deliberate interlined uniquelally to take away the life of a fellow

pra; Holloway v. McElroy, 632 F.2d 605. 628 (5th Cir.1980), cert. denied, 451 U.S. 1028, 101 S.Ct. 3019, 69 L.Ed.2d 398 (1981). The malice element, which distinguishes murder from the lesser offense of voluntary manslaughter, means simply the intent to kill in the absence of provocation. In Lamb v. Jernigan the court concluded that "malice, including both the intent component and the lack of provocation or justification, is an essential element of murder under Ga.Code Ann. § 26-1101(a) that Mullaney and its progeny require the State to prove beyond a reasonable doubt." 683 F.2d at 1337. Since the intent to commit theft is an essential element of the offense of armed robbery, the State must also prove this element beyond a reasonable doubt

In analyzing the jury instructions challenged in the present case to determine whether they unconstitutionally shift the burden of proof on the element of intent. the court has searched for prior decisions in this circuit analyzing similar language These decisions, however, provide little guidance for they reach apparently opposite results on virtually identical language. In Sandstrom the Supreme Court invalidated a charge which stated that "[t]he law presumes that a person intends the ordinary consequences of his acts," 442 U.S. at 513. 99 S.Ct. at 2453. The Court held that the jury could have construed this instruction as either creating a conclusive presumption of intent once certain subsidiary facts had been found or shifting to the defendant the burden of persuasion on the element of intent. The Court held both such effects unconstitutional. Like the instruction in Sandstrom, the instruction at issue in the present case stated that "the acts of a person of sound mind and discretion are presumed to be the product of the

> creature which is manifested by external circumstances capable of proof Mairce shall be implied where no considerable provocation appears and where all the circumstances of the killing show an abandones and malignant

23. In Franklin the trial court charged the jury

person's will, and a person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts, but both of these presumptions may be rebutted." This presumption would appear on its face to shift the burden of persuasion to the defendant. It does not contain the permissive language (intent "may be presumed when it would be the natural and necessary consequence of the particular acts.") which the Lamb court ruled created only a permissive inference rather than a mandatory presumption. Rather, the instruction at issue here states that a person is presumed to intend the natural and probable consequences of his acts. On its face this instruction directs the jury to presume intent unless the defendant rebuts it. This would appear to be the sort of burden-shifting instruction condemned by Sandstrom. This conclusion is supported by Franklin v. Francis. 720 F.2d 1206 :11th Cir 1983; which held that language virtually identical to that involved in the present case 23 violated Sandstrom In that case the court declared

This is a mandatory rebuttable presumption, as described in Sandstrom, since a reasonable juror could conclude that on finding the basic facts isound mind and discretions he must find the ultimate fact lintent for the natural consequences of an act to occur unless the defendant has proven the contrary by an undefined quantum of proof which may be more than "some" evidence 130 F 2d at 1310 However in Tienes & Francis 723 F 25 1504 (11th Cir 1984) another panel of the Eleventh Circuit, including the author of the Franklin opinion reviewed language identical to that in Franklin and concluded that it created no more than a permissive inference and did not violate Sandstrom The court in Tucker relied upon the fact

(t)he acts of a person of sound mind and discretion are presumed to be the product of the person's will but the presumption may be rebutted. A person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts, but the Presumption may be reducted Franklin : Francis 730 F 2d at 1210

other parts of his charge that criminal intent was an essential element of the crime and was a fact to be determined by the jury. The court also focused on the fact that the charge also stated that "a person will not be presumed to act with criminal intention, but the trier of fact, that is you the jury, may find such intention upon consideration of the words, conduct, demeanor, motive and all other circumstances connected with the act for which the accused is prosecuted.", Tucker, supra, at 1517. Examining the objectionable language in the context of the entire instruction under Cupp v. Naughten, 414 U.S. 141, 94 S.Ct. 396, 38 L.Ed.2d 368 (1973), the court concluded that the instruction would not unconstitutionally mislead the jury as to the prosecution's burden of proof. Tucker, supra, at 1517. The problem with this reasoning is that the exact same instructions were contained in the charge given to the jury in Franklin v. Francis. See Franklin v. Francis. 720 F.2d at 1208 n. 2. This court can find no principled way of distinguishing between the charges at issue in Franklin and in Tucker and can discern no reason why the charge in Franklin would create a mandatory rebuttable presumption while the charge in Tucker would create only a permissive inference. The Tucker court did not explain this inconsistency and in fact did not even mention Franklin.

[35] The charge at issue in the present case is virtually identical to those involved in Franklin and in Tucker. This court is bound to follow Tucker v. Francis, which is the latest expression of opinion on this subject by this circuit. The court holds that the instruction complained of in this case, taken in the context of the entire

 The relevant portion of the prosecutor's argument to the jury in favor of the death penalty is set forth below.

Now, what should you consider as you are deliberating the second time here, and 1 don't know what you are going to consider.

I would ask you however, to consider several things. Have you observed any remorae being exhibited during this trial by Mr. McCleskey? Have you observed any remorae exhibited while he was testifying?

that the trial judge instructed the jury in other parts of his charge that criminal instent was an essential element of the crime and was a fact to be determined by the stances of the case and thus did not violate stances of the case and thus did

[36] Having held that the instruction was not unconstitutional under Sandstrom, there is no need to examine the issue of harmlessness. However, the court expressly finds that even if the challenged instructions violated Sandstrom, the error was harmiess beyond a reasonable doubt. The jury had overwhelming evidence that petitioner was present at the robbery and that he was the only one of the robbers in the part of the store from which the shots were fired. The jury also had evidence that he aione of the robbers was carrying the type of weapon that killed Officer Schiatt. Finally, the jury had the testimony of Ben Wright and Offic Evans that McCleskey had not only admitted killing Officer Schlatt but had even boasted of his act. Looking at the totality of the evidence presented and laving aside questions of credibility which are the proper province of the jury, this court cannot conclude that there is any reasonable likelihood that the intent instruction, even if erroneous contributed to the jury's decision to convict petitioner of malice murder and armed robbery Pettioner's Sandstrom claim is therefore, without ment

### V CLAIM L'-PROSECUTORIAL MISCONDUCT AT THE SENTENC-ING PHASE.

[37] In this claim petitioner argues that the Assistant District Attornes improperly referred to the appellate process during his arguments to the jury at the sentencing phase of petitioner's train." References to

Have you observed any repensance by Mi-McClesses, either visually as you from at hint now or during the trial or during the time that he testified. Has he exhibited to you are present both visually or during the time that he was resulfying?

Has, the seen and least in his ever for this act that he has delive?

I would also use one to consider the prior construction that two news and arts the law year rount. And participate the one of the

the appellate process are not per se unconstitutional unless on the record as a whole it can be said that it rendered the entire trial fundamen. ally unfair. McCorquodale v. Balkcom, 705 F.2d 1553, 1556 (11th Cir. 1983); Corn v. Zant, 708 F.2d 549, 557 (11th Cir. 1983).

[38] The prosecutor's arguments in this case did not intimate to the jury that a death sentence could be reviewed or set aside on appeal. Rather, the prosecutor's argument referred to petitioner's prior criminal record and the sentences he had received. The court cannot find that such arguments had the effect of diminishing the jury's sense of responsibility for its deliberations on petitioner's sentence. Insofar as petitioner claims that the prosecutor's arguments were impermissible be-

got three convictions. I believe if you look at those papers carefully you are going to fina. I think, on one of those he got three life seniers to begin with, and then there is a cover sheet, where apparently that was reduced to what, eighteen years or filteen years or some thing, which means of course, he went through the appellate process and somehow got it reduced dured.

Now. I ask you to consider that in conjunction with the life that he has set for himself. You know. I haven t set his goals, you haven't set his goals, he set his own goals, and here is a man that served considerable periods of time in prison for armed robbery, just like. Ben Wright said, you know, that is his profession and he gets in safety, takes care of the victims, although he may threaten them, and gets out safety, that is what he considers doing a good job, but of course you may not agree with him, but that is job safety.

I don't know what the Health, Education and Welfare or whatever organization it is that checks on job safety would say, but that is what Mr. Ben Wright considers his responsibility.

Now apparently Mr. McCleskey does not consider that his responsibility, so consider that The life that he has set for himself, the direction he has set his sails, and thinking down the road, are we going to have to have another trial sometime for another peace officer, another corrections officer, or some innocent bystander who happens to walk into a store, or some innocent person who happens to be working in the store who makes the wrong move, who makes the wrong turn, that makes the wrong gesture, that moves suddenly and ends up with a builet in their head?

This has not been a pleasant task for me, and I am sure it hasn't been a pleasant task for you. I would have preferred that some of the

cause they had such an effect, the claim is without merit. \*\*

VI. CLAIM "B"—TRIAL COURT'S REFUSAL TO PROVIDE PETI-TIONER WITH FUNDS TO RE-TAIN HIS OWN EXPERT WIT-NESS.

Petitioner contends that the trial court's refusal to grant funds for the employment of a ballistics expert to impeach the testimony of Kelley Fite, the State's ballistics expert, denied him due process. This claim is clearly without ment for the reasons provided in Moore v. Zant, 722 F.2d 640 (11th Cir 1983).

[39, 40] Under Georgia law the appointment of an expert in a case such as this

other Assistants downstairs be trying this case. I would prefer some of the others be right here now instead of me, and I figure a lot of you are figuring why did I get on this jury, why not some of the other jurors, let them make the decision.

I don't know why you are here, but you are here and I have to be here. It has been unpleasant for me, but that is my duty. I have tried to do it with justice. I have no personal animosity toward Mr. McCleskey, I have no words with him. I don't intend to have any words with him, but I intend to follow what I consider to be my duty, my honor and justice in this case, and I ask you to do the same thing, that you sentence him to die, and that you find aggravating circumstances, both of them in this case.

Transcript at 1019-21

27. Although the point has not been argued by either side and is thus not properly before the court, the prosecutor's arguments may have been importmissible on the grounds that they encouraged the juny to take into account the possibility that peritioner would kill again if given a life sentence. Such "future victims" arguments have recently been condemned by the Eleventh Circuit on the grounds that they encourage the jury to impose a sentence of death for improper or irrelevant reasons. See Tucker t. Francis. 723 F.2d 1504 (11th Cir. 1983). Hance v. Zaint. 896 F.2d 940 (11th Cir. 1983). Hance v. Zaint. 896 F.2d 940 (11th Cir. 1983). The court makes no intimation about the merits of such an argument and makes mention of it only for the purpose of pointing out that it has not been raised by fully competent counse.

trial court. See Whitaker v. State. 246 Ga. 163, 269 S.E.2d 436 (1980). In this case the State presented an expert witness to present ballistics evidence that the bullet which killed Officer Schlatt was probably fired from a gun matching the description of the gun petitioner had stolen in an earlyer robbery and which matched the description of the gun several witnesses testified the petitioner was carrying on the day of the robbery at the Dixie Furniture Company. Peutioner had ample opportunity to examine the evidence prior to trial and to subject the expert to a thorough cross-examination. Nothing in the record indicates that the expert was biased or incompetent. This court cannot conclude therefore that the trial court abused its discretion in denying petitioner funds for an additional ballistics expert.

VII. CLAIM "D"-TRIAL COURT'S INSTRUCTIONS REGARDING USE OF EVIDENCE OF OTHER CRIMES AT GUILT STAGE OF PETITIONER'S TRIAL.

Petitioner claims that the trial court's instructions regarding the purposes for which the jury could examine evidence that petitioner had purticipated in other robbieries for which he had not been indicted was overly broad and siminushed the reliability of the jury's guilt determination

[41, 42] During the trul the prosecution introduced evidence that petitioner had partropated in armed robbenes of the Red Dot Grocery Store and the Red Dot Fruit Stand At that time the trial judge chutioned the jury that the evidence was admitted for the umited purpose of laiding in the identification and illustrating the state of mind, plan, motive, intent and scheme of the accused, if in fact it does to the jury so do that." The evidence tended to establish

28. The relevant portion of the trial judge y in siructions to the jury were as failous

Now ladies and gentiemen there was certain evidence that was introduced here and ! told you it was introduced for a limited for pesc, and I will repeat the cautionary charge ! gave you at that time

ordinarily lies within the discretion of the that petitioner had participated in earlier armed robberies employing the same modus operand; and that in one of these robberies he had stolen what was alleged to have been the weapon that killed Officer Schlatt. Such evidence is admissible under Georgia law. Ser Hamilton r. State. 239 Ga. 72, 235 S.E.2d 515 (1977). Petitioner objects that the trial court's instructions regarding the use of this evidence were overbroad because "(a) the prosecution itself had offered the evidence of other transactions for the purpose of showing the identity of the accused rather than to show intent or state of mind, and (b) it is irrational to instruct that evidence of an accused's participation in another transaction where a murder did not occur is probative of the accused's intent to commit malice murder. Petitioner's Memorandum of Law in Support of Issuance of the Writ at 10-11 Both of these contentions are without merit. First, the court sees nothing in the court's instructions to support petitioner's contention that the jury was allowed to find intent to commit malice murder from the evidence of the prior crimes Peutioner was charged with armed robbery and murier The evidence of the Red Dot Grocurs Store roubers was admissible for the purpose of snowing that petitioner had stoen the murter weapon. The evidence of the other armed rouseries was admissible for the purpose of showing a common scheme or plan on the armed ronbers count. Also, the evidence of the Red Dot Fruit Stand rothery was admitted for mpeachment jurposes only after the petitioner took the stand in his own defense. The court has read the trial court's instructions and cannot conclude that the instructions were overbroud or donied petitioner a fair trial Set Speciere o Terras, 385 U.S. 554 560-61 97 8 Ct 649 631-52. 17 L.Ed 2d 666 (1967) P

I had you that in the prince, altun of a partieur at come coldence which is any manner lands to show that the second has committed animal transaction whoils distinct independen and separate trim ingi for which he a not the sign through the shows a transaction of the same hards with time of me though VIII. CLAIM "E"—EVIDENCE OF NON-STATUTORY AGGRA-VATING CIRCUMSTANCES PRESENTEL AT PENALTY STAGE OF PETITIONER'S TRI-AL.

[43] Petitioner contends that the trial court erred by giving the jury complete, unlimited discretion to use any of the evidence presented at the trial during its deliberations regarding imposition of the death penalty. Petitioner's claim is without merit. The trial judge specifically instructed, the jury that it could not impose the death penalty unless it found at least one statutory aggravating circumstance. He also instructed the jury that if it found one or more statutory aggravating circumstances it could also consider any other mitigating or aggravating circumstances in determin-

and in the same localities, it is admitted into evidence for the limited purpose of aiding in identification and illustrating the state of mind, plan, motive, intent and scheme of the accused, if, in fact, it does to the jury so do that

Now, whether or not this defendant was involved in such similar transaction or transactions is a matter for you to determine. Furthermore, if you conclude that the defendant was involved in this transaction or these transactions, you should consider it follers with reference to the mental state of the defendant insolar as it is applicable to the charges set forth in the indictment, and the court in charging you this principle of law in no way intimates whether such transaction or transactions, if any, tend to illustrate the state of mind or intent of the defendant or aids in identification, that is a matter for you to do termine.

Transcript at 902-93

 The relevant portion of the judge's sentencing charge is printed below. The challenged portion is underlined.

I charge you that in arriving at your determination you must first determine whether at the time the crime was committed either of the following aggravating circumstances was present and existed beyond a reasonable doubt, one, that the offense of murder was committed while the offense of murder was engaged in the commission of another capital fellow, to wit, armed robbery, and two, the offense of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official outers.

VIII. CLAIM "E"-EVIDENCE OF ing whether or not the death penalty NON-STATUTORY AGGRA- should be imposed, --

Georgia's capital sentencing procedure has been declared constitutional by the Supreme Court in Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). Just recently the Supreme Court examined an argument similar to the one petitioner makes here in Zant v. Stephens, - U.S. -, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983). In that case the Court dealt with the argument that allowing the jury to consider any aggravating circumstances once a statutory aggravating circumstance had been found allowed the jury unbridled discretion in determining whether or not to impose the death penalty on a certain class of defendants. The Court stated:

Our cases indicate, then, that statutory abgravating circumstances play a consti-

Now, if you find one or both of these aggravating circumstances existed beyond a reasoanble doubt, upon consideration of the offense of murder, then you would be authorized to consider imposing a sentence of death relative to that offense.

If you do not find beyond a reasonable doubt that one of the two of these aggravating circumstances existed with reference to the offense of murder, then you would not be authorized to consider the penalty of death, and in that event the penalty imposed would be imprisonment for life as provided by law.

in arriving at lour dote mination of which penalty shall be imposed from are authorized to consider all of the evidence received with major projection by the Salar and he days a day projection the trial before your

You should consider the facts and circumstances in mitigation. Mitigating circumstances are those which do not constitute a justification or excuse for the offense in question, but which in fairness and mere; may be considered as extenuating or reducing the degree of moral culpability or blame.

Now, it is not mandatory that you impose the death penalty even if you should find one of the aggravating circumstances does exist or did exist. You could only imprise the death penalty if you do find one of the two statutory aggravating circumstances. I have submitted to you, but if you find one to exist or born of them to exist, it is not mandatory upon you to impose the death penalty.

Transcript 1027-29

stage of legislative definition: They circumscribe the class of persons eligible for the death penalty. But the Constitution does not require the jury to ignore other possible aggravating factors in the process of selecting, from among that class, those defendants who will actually be sentenced to death. What is important at the selection stage is an individuglized determination on the basis of the character of the individual and the circumstances of the crime. Zant v. Stephens. - U.S. - 103 S.Ct. at 2743-44 [77 L.Ed.2d 235] (emphasis in original).

The court specifically approved in Zant v. Stephens consideration by the jury of nonstatutory aggravating circumstances, provided that such evidence is not "constitutionally impermissible or totally irrelevant to the sentencing process, such as for example the race, religion or political affiliation of the defendant." Id 103 S.Ct. at 27.47

The sentencing jury in this case found two statutory aggravating circumstances: (1) That the offense of murder had been committed while McCleskey was engaged in the commission of another capital felony: and (2) that the offense of murder was committed against a peace officer while engaged in the performance of his official duties. The trial judge could therefore properly admit any additional evidence in extenuation, mitigation, and aggravation of punishment, including the record of any prior conviction. . provided that the evicircumstances of his offense. " Moore to Zant. 722 F 2d 640 at 644 (11th Cir 1983) tends that this questioning concerning the

30. A pomion of the cross-examination was as forlows.

- Or Are you saving you were guilty or you
- a Weil I was guilty on this.
- Three counts of armed robbers?
- Pardon me?
- O. You were guilty for the three counts of armed robben
- Yes sit
- Q How about the other two that you pied fully to were you guitt of those?

tutionally necessary function at the (quoting Lockett v. Ohio, 438 U.S. 586, 604 n. 12. 98 S.Ct. 2954. 2965 n. 12. 57 L.Ed.2d 973 (1978)). For the reasons stated in Zant E. Stephens, supra, and Moore E. Zant, supra petitioner's claim is without merit.

> IX. CLAIM "F"-WHETHER THE ADMISSION AT PETITIONER'S TRIAL OF EVIDENCE CON-CERNING PRIOR CRIMES AND CONVICTIONS VIOLATED PETI-PROCESS DUE TIONER'S RIGHTS

Petitioner contends that the admission of evidence concerning two prior armed robberies for which he had not-been indicted and the admission of details of other prior . armed robbenes for which he had been convicted violated his due process rights This court has already concluded in Part VII. supra, that the evidence that petitioner participated in prior armed robbernes was properly admitted to show petitioner's scheme, motive, intent or design and that the trial judge's instructions properly limited the use of this evidence. See also McClesky v. State. 245 Ga. 108. 114. 263 S.E.2d 146 (1980). The evidence to which petitioner objects most strongly in Claim 'F' concerns details of prior armed robberies for which petitioner had been convicted. When petitioner took the stand in his own defense he admitted on direct examination that he had previously been convicted of armed robbery. He admitted to being guilty of those crimes, gave the dates of the convictions and the sentences he had received. On cross-examination the Assistant District Attorney asked petitiondence bore on 'defendant's prior record, or er a number of questions concerning the details of those robberies " Petitioner con-

A I was guilty on the Cobe County but the others I was not guilty of, but I pleased guiltto them animal because the I am I didn see no reason to go through a long process of lighting them, and I siready had a large sen-

O So you are guilty for the Douglas County armed robberies and the Cobe County rob ben, but not the Fulton County roopen?

A pleaded guilt to it.

O To the Futon County?

Surv

details of crimes to which petitioner had admitted guilt exceeded the bounds of what was permissible for impeachment purposes, was irrelevant to the crimes for which he was being tried, and served to prejudice the jury against him. The Supreme Court of Georgia has already declared that this evidence was properly admitted under the Georgia Rules of Evidence. Petitioner asks this court now to declare the Georgia rule allowing the admissibility of this evidence to be violative of the due process clause of the Fourteenth Amendment.

Q: But are you guilty of that robbery?

A: I wasn't guilty of it, but I pleaded guilty to

But you were pullty in all of the robberies in Cook Coun and Douglas County, is that COFFECT?

A: I have stated I am guilty for them, but for the ones in Fulton County, no. I wasn't guilty of it. I pleaded guilty to it because I didn't

see no harm it could do to me.

Q: Now, one of those armed robbenes in Douglas County, do you recall where that might have been?

You mean place?

O: Yes, sir.

4. I know it was a loan company.

Q Kennesaw Finance Company on Broad Street, is that about correct?

 A: That sounds familiar.
 And did you go into that place of business at approximately closing time?

A: I would say yes.

Q: Did you tie the manager and the—the managers up?

No. I didn't do that.

Did somebody tie them up?

0 Did they curse those people?

Did they curse them?

Yes, sir

Not to my recollection.

Did they threaten to kill those people?

Not to my recollection.

O: Did somebody else threaten to kill them? I don't remember anybody making any threats. I vaguely remember the incident, but I don't remember any threats being issued

New, the robbery in Cobb County, do you remember where that might have been.

A. Yes, sir, that was at Kennesaw Finance. I

believe.

Q: And do you remember what time of day that robbery took place?

A: If I am not mistaken, I think it was on the 23rd day of July.

0 19702

A: Right.

Q: About 4:30 p.m.?

In Beck v. Alabama, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980), the Supreme Court stated:

To insure that the death penalty is indeed imposed on the basis of "reason rather than caprice of emotion," we have invalidated procedural rules that tended to diminish the reliability of the sentencing determination. The same reasoning must apply to rules that diminish the reliability of the guilt determination. Id. at 638, 100 S.Ct. at 2390.

A: Yes sir

Q: Were you found inside the store on the floor with a .32 caliber revolver?

Yes, sir, they caught me red-handed. I couldn't deny it.

And did you arrive there with an automobile parked around the corner?

A: I didn't have an automobile

Q: Did that belong to Harold McHenry?

A: McHenry had the automobile

And was he with you in the robbery?

A: Yes, sir.

Q: And was that automobile parked around the corner with the motor running?

A: At that time I don't know exactly where it was parked because I didn't get out right there around the corner, I got out of the street from the place and he was supposed to pick us up right there, but unfortunately he didn't make

Q: You also have been convicted out in De Kalb County, haven't you?

A: Yes, sir, I entered a plea out there. All of those charges stem from 1970.

What did you plead guilty to out in De Kalb County?

A. Robbery charge

O: Armed robbers

A: Yes, sir.

Q: And where was that at, sic?

I don't know-I don't remember exactly where the robbery was supposed to have took place, but I remember entering a guilty plea 10 11

Were you guilty of that?

4. No. sir. I wasn't guilty of it. Like I said. I had spent money on top of money trying to fight these cases and I didn't see any mood to continue to fight cases and the to win them and I have already got a large sentence any way

I believe the DeKalb County case was out at the Dixie Finance Company out in Lithonia, is that correct?

A. I don't really recoilect. I do remember the charge coming out, but I don't recall evactly what place it was

Transcript 945-849

In Beck the Supreme Court struck down an Alabama statute which prohibited a trial judge from instructing the jury in a murder case that it could find the defendant guilty of a lesser-included offense. The Court ruled that this statute distorted the factfinding function of the jury. "In the final analysis the difficulty with the Alabama statute is that it interjects irrelevant conaiderations into the factfinding process, diverting the jury's attention from the centrai issue of whether the State has satisfied its burden of proving beyond a reasonable doubt that the defendant is guilty of a capital crime." Id. at 642, 100 S.Ct. at 2392

In Green v. Georgia, 442 U.S. 95, 99 S.Ct. 2150, 60 L.Ed.2d 738 (1979) the Supreme Court set aside a death sentence on the grounds that the state trial court had excluded certain hearsay testimony at the sentencing portion of petitioner's trial. In that case the Court stated:

Regardless of whether the proffered testimony comes within Georgia's hearsay rule, under the facts of this case its exclusion constituted a violation of the Due Process Clause of the Fourteenth Amendment. Id. at 96, 99 S.Ct. at 2151.

[44] It seems clear from these cases that a state procedural or evidentiary rule which might substantially diminish the reliability of the factfinding function of the jury in a capital case would violate the due process clause of the Fourteenth Amendment. The question, then, is whether or not the admissibility of the details of other crimes can be said to have had the effect of diminishing "the reliability of the guilt determination." Petitioner has cited several cases from this and other circuits which have held that the admission in a federal prosecution of details of prior crimes to which the defendant had admitted guilt was unfairly prejudicial and constituted reversible error. See. e.g., United States v. Tumblin. 331 F.2d 1001 (5th Cir.1977); United States v. Harding, 325 F.2d 84 (7th Cir.1975) ("The rule that it is error to inquire about the details of prior criminal conduct is so well established that such

error is cognizable despite the absence of any objection by defense counsel."). The point petitioner has overlooked is that prosecutions in federal court are governed by the Federal Rules of Evidence. Each of the cases petitioner has cited rely to a greater or lesser extent upon an interpretation of those rules. While the Federal Rules of Evidence embody a modern concept of fairness and due process, it is not for this court to say that they are the only embodiment of due process or the standard against which state rules of evidence must be judged. While the evidence presented at petitioner's trial would probably not have been admitted in a federal prosecution, this court cannot conclude that it was so seriously prejudicial that it undermined the reliability of the jury's guilt determination. Petitioner's Claim "F" is therefore without merit.

#### X. CLAIM. "M"-THE SUGGESTIVE LINEUP.

[45] In this claim petitioner contends that he was shown to at least three witnesses for the State in an illegal and highly suggestive display immediately prior to his trial without the knowledge, consent, or presence of defense counsel. The Supreme Court of Georgia thoroughly addressed this concern and found against petitioner. McClesky v. State. 245 Ga. 108, 110-12, 263 S.E.2d 146 (1980). In its discussion the Supreme Court of Georgia stated:

The record shows that four witnesses immediately prior to the call of the case saw the appellant and four other persons sitting in the jury box guarded by deputy sheriffs. Each of these witnesses testified that they recognized the appellant as one of the robbers at the time they saw him seated in the jury box. There is no indication that the witnesses were asked to view the man seated in the jury box and see if they recognized anyone. No one pointed out the appellant as the defendant in the case, rather it is apparent from the witnesses' testimony that each recognized the appellant from having viewed him at the scene of the respective robberies. Therefore, no illegal post-indictment lineup occurred....

Appellant argues further that the four witnesses viewing him in the jury box as he awaited trial along with police identification procedures impermissibly tainted the witnesses' in-court identification of the appellant.

The threshold inquiry is whether the identification procedure was impermissibly suggestive. Only if it was, need the court consider the second question: Whether there was a substantial likelihood of irreparable misidentification...

The chance viewing of the appellant prior to trial as he sat with others was no more suggestive than seeing him in the hall as he and other defendants are being brought in for trial, or seeing him seated at the defense table as each witness comes in to testify. We conclude that the chance viewing of the appellant immediately prior to trial by four of the State's witnesses was not impermissibly suggestive. Also we find the identifications were not tainted by police identification procedures. 245 Ga. at 110, 263 S.E.2d 146.

Although the court found that the display was not impermissibly suggestive, the court went on to examine whether the incourt identifications were reliatle and found that they were. This court finds no basis in the record or in the arguments presented by petitioner for concluding that the Supreme Court of Georgia was in error. The court therefore finds that petitioner's Claim "M" is without merit.

XI. CLAIM "N"—WHETHER PETI-TIONER'S STATEMENT. INTRO-DUCED AT TRIAL WAS FREELY AND VOLUNTARILY GIVEN AF-TER A KNOWING WAIVER OF PETITIONER'S RIGHTS.

[46] In this claim petitioner contends that the admission at trial of his statements given to the police was error because the statements were not freely and voluntarily given after a knowing waiver of rights. Before the statement was revealed to the jury the trial court held, outside of

the presence of the jury, a Jackson v. Denno hearing. The testimony at this hearing revealed that at the time he was arrested petitioner denied any knowledge of the Dixie Furniture Store robbery. He was detained overnight in the Marietta Jail. The next morning when two Atlanta police officers arrived to transfer him to Atlanta they advised him of his full Miranda rights. He again denied any knowledge of the Dixie Furniture Store robbery. There was some dispute about what was said during the half-hour trip back to Atlanta. Petitioner claimed that the officers told him that his co-defendants had implicated him and that if he did not start talking they would throw him out of the car. The officers, of course, denied making any such threat but did admit that they told petitioner that the other defendants were "trying to stick it on" him. The officers testified that during the trip back, after being fully advised of his Miranda rights and not being subjected to any coercion or threats. petitioner admitted his full participation in the robbery but denied that he shot Officer Schlatt

Immediately upon arrival at the Atlanta Police Department petitioner was taken to Detective Jowers. At that time petitioner told Jowers that he was ready to talk. Detective Jowers had petitioner execute a written waiver of counsel. This waiver included full Miranda warnings and a statement that no threats or promises had been made to induce petitioner's, signature Peritioner's statement was then taken over the next several hours. During the first part of this session petitioner simply narrated a statement to a secretary who typed it. The secretary testified that petitioner was dissatisfied with the first draft of the statement and started another one. The first draft was thrown away.

After petitioner finished his narration Detective Jowers proceeded to ask him a number of questions about the crime. This questioning went on for some time off the record. Finally, a formal question and answer session was held on the record. These questions and answers were typed up by the secretary and signed by petition-

It is undisputed that the atmosphere in the room where the statement was being taken was unusually relaxed and congenial. considering the gravity of the crime of which petitioner was accused. The secretary who typed it testified that she had never seen the police officers treat a murder suspect with such warmth.31

After hearing all of the testimony and considering petitioner's argument that the police had engaged in a "Mutt and Jeff" routine." the trial court ruled that the statement had been freely and voluntarily given after a knowing waiver of petitioner's Miranda rights. The jury was then returned and the statement and testimony were introduced.

After having read the transcript of the proceedings this court cannot conclude that the trial judge erred in his finding that the statement was freely and voluntarily given. There was no error, therefore, in admitting the statement into evidence. Petitioner's Claim "N" is therefore without ment.

- 31. The officers gave petitioner cigarettes, potato chips, and soft drinks during the interrogation. They also at one point discussed with him the attractiveness of a particular female officer
- 32. Such routines involve one group of officers acting hostile and threatening toward the defer dant while another officer or group of officers seemingly befriends him and showers him with kindness. The rationale for such routines is that defendants often believe they have found a friend on the police force to whom they can tell their story
- 33. The examination of Miss Barbara J Weston
- Now, Miss Weston, are you conscientious. ly opposed to capital punishment?
- Yes. O: Your opposition towards capital punish. ment, would that cause you to vote against it
- regardless of what the facts of the case might A: Yes. I would say so, because of the doc trine of our church. We have a manual that
- we go by 0: Does your church doctrine oppose capital
- punishment?
- O. So you would oppose the imposition of capital punishment regardless of what the facts would be?

CLAIM "O"-EXCLUSION OF DEATH-SCRUPLED JURORS.

Petitioner claims that the exclusion of two prospective jurors because of their opposition to the death penalty violated his Sixth Amendment rights under Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770. 20 L.Ed.2d 776 (1968). Both jurors indicated that they would not under any circumstances consider the death penalty.13

[47] In Witherspoon v. Illinois, supra, the Supreme Court held that a person could not be sentenced to death by a jury from which persons who had moral reservations about the death penalty had been excluded. unless those persons had indicated that their opposition to the death penalty would prevent them from fulfilling their oaths as jurors to apply the law:

[N]othing we say today bears upon the power of a State to execute a defendant sentenced to death by a jury from which the only veniremen who were in fact excluded for cause were those who made unmistakably clear (1) that they would

- You would not even consider that as one of the alternatives
- No. I wouldn't
- The Court: Mr. Turner, any questions you want to ask?
- Mr Turner No questions from me.
  The Court: Miss Weston, I will excuse you from this case.
- Transcript 98-99
- The testimony of Emma T. Cason was as foilows
- Mrs. Cason, are you conscientiously op-0 posed to capital punishment?
- Yes.
- Q You are? 1'05.
- If you had two alternatives in a case as far as penalties go, that is, impose the death senience or life penalty, could you at least consider the imposition of the death penalty
- A . I don : think so, no. I would have to say
- Q Under any circumstances you would not consider it?
- No.
- Mr. Parker Thank you
- The Court. Any questions' Mr Turner No questions
- The Court Mrs. Cason I will excuse you and let you return to the jury assembly room on
- Transcript 129-30

automatically vote against the imposition of capital punishment without regard to any evidence that might be exveloped at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt. 391 U.S. at 522-23 n. 21, 88 S.Ct at 1776-77 n. 21 (emphasis in original).

Since the two prospective jurors in this case indicated that they would not under any circumstances vote for the death penalty, the trial court committed no error in excluding them. See Boulden v. Holman. 394 U.S. 478, 89 S.Ct. 1138, 22 L.Ed.2d 433 (1969).

[48] Petitioner's argument that the exclusion of death-scrupied jurors violated his right to be tried by a jury drawn from a representative cross section of his community has already been considered and rejected in this circuit. Smith v. Balkcom. 660 F 2d 573, 582-83 (5th Cir. Unit B 1981). cert. denied. 459 U.S. 882, 103 S.Ct. 181. 74 LEd.2d 148 (1982); Spinkellink v. Wainumght, 578 F.2d 582, 593-99 (5th Cir. 1978), cert. denied, 440 U.S. 976, 99 S.Ct. 1548. 59 L.Ed.2d 796, reh'g denied, 441 U.S. 937, 99 S.Ct. 2064, 60 L.Ed.2d 667 (1979). The Court in Spinkellink also rejected petitioner's claims that the exclusion of death-scrupled jurors resulted in a prosecution-prone jury or a jury that was incapable of maintaining "a link between contemporary community values and the penal system." 578 F.2d at 593-99. See generally. Woodson v. North Carolina, 428 U.S. 280, 295, 96 S.Ct. 2978, 2987, 49 L.Ed.2d 944 (1976).

Because the two prospective jurors indicated they would not consider the death penalty under any circumstances, they were properly excluded, and petitioner's Claim "O" is without merit.

XIII. CLAIM "I"—PETITIONER'S CLAIM THAT THE DEATH PENALTY FAILS TO SERVE RATIONAL INTERESTS.

In his petition for the writ petitioner raised a claim that the death penalty fails

to serve rational interests. Neither petitioner nor the State has briefed this issue. but the premise appears to be that the supposed deterrent value of the death penalty cannot be demonstrated; that executions set socially-sanctioned examples of violence; that public sentiment for retribution is not so strong as to justify use of the death penalty; and that no penal purpose is served by execution which cannot be more effectively served by life imprisonment. Such arguments are more properly addressed to the political bodies. See Furman v. Georgia, 408 U.S. 238, 410, 92 S.Ct. 2726, 2814, 33 L.Ed.2f 346 (1972) (Blackmun. J., dissenting). Georgia's death penalty was declared constitutional in Gregg v. Georgia. 425 U.S. 153, 183, 96 S.Ct. 2909. 2929. 49 L.Ed.2d 859 (1976). Petitioner's Claim "I" is therefore without merit.

#### XIV. CLAIM "Q"-PETITIONER'S BRADY CLAIM.

Petitioner contends that prior to trial defense counsel filed a Brady motion seeking, inter alia, statements he was alleged to have been made and that the State failed to produce the statement that was alleged to have been made to Offie Evans while in the Fulton County Juil. Petitioner contends that this failure to produce the statement prior to trial entities him to a new recolumn.

[49, 50] Brady v. Maryland. 373 U.S. 83, 83 S.Ct. 1194. 10 L.Ed.2d 215 (1963) requires, the prosecution to produce any evidence in its possession which would tend to be favorable or exculpatory to the defendant. However, Brady does not establish any right to pretrial discovery in a criminal case, but instead seeks only to insure the fairness of a defendant's trial and the reliability of the jury's determinations. United States v. Brasiey, 576 F.2d 626 (5th Cir. 1978), cert. denied. 440 U.S. 947, 99 S.Ct. 1426, 59 L.Ed.2d 636 (1979). Thus, a defendant who seeks a new trial under Brady must meet three require-

The prosecutor's suppression of the evidence, (2) the favorable character of the suppressed evidence for the defense, and (3) the materiality of the suppressed evidence." Martinez v. Wainwright, 621 F.2d 184 (5th Cir.1980); United States v. Preston, 608 F.2d 626, 637 (5th Cir.1979). cert denied, 446 U.S. 940, 100 S.Ct. 2162, 64 L.Ed.2d 794 (1980): United States v. Delk. 586 F.2d 513, 518 (5th Cir.1978).

[51] As a preliminary matter the court notes that the testimony of Offic Evans was hardly favorable to petitioner. Most of the testimony was highly damaging to petitioner. The only part of the testimony which could even remotely be regarded as favorable was Evans' testimony that McCleskey had told him that his face had been made up on the morning of the robbery by Mary Jenkins. This testimony contradicted Mary Jenkins' earlier testimony and thus had impeachment value against one of the State's witnesses. However, the very testimony that would have been impeached was testimony favorable to petitioner. Jenkins' testimony that petitioner had clear skin and no scar on the day of the crime contradicted the testimony of the store employees that the person in the front of the store had a rough, pimply complexion and a scar. Thus, Jenkins' testimony regarding petitioner's complexion on the morning of the crime helped create doubt in his favor. Impeachment of that testimony would have hurt rather than helped petitioner.

As a secondary matter, the court cannot see that the evidence in question was suppressed by the prosecution. While it was not produced prior to trial, it was produced during the trial. Thus, the jury was able to consider it in its deliberations. Petitioner has produced no cases to support the proposition that the failure of the prosecution to produce evidence prior to trial entitles him to a new trial where that evidence was produced during the trial. Since the evidence was before the jury, the court cannot find that the failure to disclose itprior to trial deprived petitioner of due ing Officer Schlatt. Evans testified that

ments to establish a successful claim: "(1) process. Petitioner's Claim "Q" is clearly without merit.

#### XV. CLAIM "R"-SUFFICIENCY OF THE EVIDENCE.

By this claim petitioner contends that the evidence introduced at trial was insufficient to prove beyond a reasonable doubt that he was the triggerman who shot Officer Schlatt and that the shooting constituted malice murder. Petitioner does not argue that the evidence was insufficient to support his conviction for armed robbery.

[52] As part of its review in this case, the Supreme Court found that "the evidence factually substantiates and supports the finding of the aggravating circumstances, the finding of guilt, and the sentence of death by a rational trier of fact beyond a reasonable doubt." McClesky v. State, 245 Ga. 108. 115. 263 S.E.2d 146 (1980). In reviewing the sufficiency of the evidence. this court must view the evidence in a light most favorable to the State and should sustain the jury's verdict unless it finds that no rational trier of fact could find the defendant guilty beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307. 99 S.CL 2781, 61 LEd.2d 560 (1979).

Much of the evidence against petitioner was circumstantial. Witnesses placed him in the front of the store carrying a nickelplated revolver matching the description of a 38 caliber Rossi which petitioner had stolen in an earlier armed robbery. The State's ballistics expert testified that the bullet which killed Officer Schlatt was probably fired from a .38 caliber Rossi. At least one witness testified that the shots were fired from a point closer to the front of the store than she was lying.

[53] While the circumstantial evidence alone may not have been sufficient to support a verdict of malice murder, the State also introduced highly damaging testimony by one of the co-defendants. Ben Wright, and a fellow inmate at the Fulton County Jail. Offie Evans Both of these witnesses. sestified that petitioner had admitted shootMcCleskey told him that he would have shot his way out of the store even if there had been a dozen police officers. It is not this court's function to weigh the credibility of this testimony. That was for the jury to do. Viewing all the evidence in a light most favorable to the State, this court cannot find that no rational trier of fact could find petitioner guilty beyond a reasonable doubt of malice murder. Jackson v. Virginia, supra. Petitioner's Claim "R" is therefore without merit.

#### XVI. CLAIM "P"-INEFFECTIVE AS-SISTANCE OF COUNSEL

By this claim petitioner contends that he was denied effective assistance of counsel in contravention of the Sixth and Fourteenth Amendments. He alleges that his counsel was ineffective for the following reasons: (1) That his attorney failed to investigate adequately the State's evidence and possible defenses prior to trial; (2) that during the trial counsel failed to raise certain objections or make certain motions; (3) that prior to the sentencing phase of petitioner's trial counsel failed to undertake an independent investigation into possible mitigating evidence and thus was unable to offer any mitigating evidence to the jury: and (4) that after the trial, counsel fuiled to review and correct the judge's sentence report.

[54-57] It is well established in this circuit that a criminal defendant is entitled to effective assistance of counsel-that is. "counsel reasonably likely to render and rendering reasonably effective assistance." See, e.g., Washington v. Strickland, 693 F.2d 1243, 1250 (5th Cir. Unit B. 1982) (en banci, cert. granted. - U.S. -, 103 S.Ct. 2451. 77 L.Ed.2d 1332 (1983); Gaines v. Hopper, 575 F.2d 1147, 1149 (5th Cir. 1978): Herring v. Estelle. 491 F.2d 125, 127 (5th Cir.1974); MacKenna v. Ellis, 290 F.2d 592, 599 (5th Cir. 1960), cert denied. 368 U.S. 877, 82 S.Ct. 121, 7 L.Ed.2d 78 (1961). However, the Constitution does not guarantee errorless counsel or counsel judged ineffective only by hindsight. Herring v. Esteile, supra. In order to be

entitled to habeas corpus relief on a claim of meffective assistance of counsel, petitioner must establish by a preponderance of the evidence: (1) That based upon the totality of circumstances in the entire record his counsel was not "reasonably likely to render" and in fact did not render "reasonsbly effective assistance." and (2) that "ineffectiveness of counsel resulted in actual and substantial disadvantage to the course of his defense." Washington v. Strickland. 693 F.2d 1243, 1262 (5th Cir. Unit B 1982) (en banc). Even if petitioner meets this burden, habeas corpus relief may still be denied if the State can prove that "in the context of all the evidence ... it remains certain beyond a reasonable doubt that the outcome of the proceedings would not have been altered but for the ineffectiveness of counsel." Id. With these standards in mind the court now addresses petitioner's particular contentions

#### A. Pretrial Investigation.

It is beyond dispute that effective assistance of counsel requires some degree of pretrial investigation. "Informed evaluation of potential defenses to criminal charges and meaningful discussion with one's client of the realities of his case are cornerstones of effective assistance of Gaines v. Hopper, 575 F.2d 1147. 1149-50 (5th Cir. 1978). In Washington v. Strickland. 603 F.2d 1243 iSch. Cir. Unit B 1982) (en banc), the court discussed the extent of pretrial investigation required to constitute effective assistance of counsel. In that case the court stated: The amount of pretrial investigation that is reasonable defies precise measurement. It will necessarily depend upon a variety of factors including the number of issues in the case, relative complexity of those issues, the strength of the government's case, and the overal! strategy of trial counse! ... In making that determination, courts should not judge the reasonableness of counsel's efforts from the omniscient perspective of hindsight, but rather "from the perspective of counsel, taking into account all of the circumstances of the case, but only as those circumstances were known to him at the time in question." Id. at 1251 (quoting Washington v. Watkins, 655 F.2d 1346 at 1356 [5th Cir. Unit A 1981]).

The court went on to analyze a variety of cases falling into five general categories. The category of cases identified by the Washington court which most closely resembles the present case was the one in which "counsel fails to conduct a substantial investigation into one plausible line of defense because of his reasonable strategic choice to rely upon another plausible line of defense at trial." In analyzing these cases the court stated:

As observed above, when effective counsel would discern several plausible lines of defense he should ideally perform a substantial investigation into each line before making a strategic decision as to which lines he will employ at trial. In this ideal, as expressed in the American Bar Association's Standards, is an aspiration to which all defense counsel should strive. It does not, however, represent the constitutional minimum for reasonably effective assistance of counsel. Realistically, given the finite resources of time and money that are available to defense counsel, fewer than all plausible lines of defense will be the subject of substantial investigation. Often counsel will make a choice of trial strategy relatively early in the representation process after conferring with his client, reviewing the State's evidence, and bringing to bear his experience and professional judgment. Thereafter, he will constitute his finite resources on investigating

34. The five categories of cases dealing with claims of ineffective assistance of counsel in the pretrial investigation were: (1) counsel fails to conduct substantial investigation into the one plausible line of defense in the case. (2) counsel conducts a reasonably substantial investigation into the one line of defense that is presented attrial: (3) counsel conducts a reasonably substantial investigation into all plausible lines of defense and chooses to rely upon fewer than all of them at trial: (4) counsel fails to conduct a substantial investigation into one plausible line of defense because of his reasonable strategic choice to rely upon another plausible line of defense at trial: and (5) counsel fails to conduct

those lines of defense upon which he has chosen to rely.

The choice by counsel to rely upon certain lines of defense to the exclusion of others before investigating all such lines is a strategic choice.

A strategy chosen without the benefit of a reasonably substantial investigation into all plausible lines of defense is generally based upon counsel's professional assumptions regarding the prospects for success offered by the various lines. The cases generally conform to a workable and sensible rule: When counsel's assumptions are reasonable, given the totality of the circumstances and when counsel's strategy represents a reasonable choice based upon those assumptions. Counsel need not investigate lines of defense that he has chosen not to employ at trial. 693 F.2d at 1254-55.

[58] In the present case petitioner's trial counsel was faced with two plausible lines of defense-an alibi defense or a defense that petitioner participated in the robbery but was not the triggerman who killed Officer Schlatt. Pursuing the second defense would almost have guaranteed a conviction for armed robbery and felony murder, for which petitioner could still have received the death penalty or at least life imprisonment.28 On the other hand, a successful alibi defense offered the prospect of no punishment at all. Trial counsel testified at the state habeas corpus hearing that McCleskey had repeatedly insisted that he was not present at the crime. Trial counsel also testified that after the preliminary hearing he and McCleskey reasonably

a substantial investigation into plausible lines of defense for reasons other than strategic choice.

35. Under Georgia law applicable at the time of pertitioner's trial, pertitioner, as a party to the crime of armed robbery, would have been subject to the same penalty for the death of Officer Schlatt irrrespective of whether he actually pulled the trigger. See Ga.Code Ann. § 26–801 (now codified at D.C.G.A. § 16–2-21). Under Georgia law at the time both murder and felony murder were punishable by death or life imprisonment. Ga.Code Ann. § 26–1101 (now codified at O.C.G.A. § 16–5-1).

believed that an alibi defense could be successful. A primary reason for this belief was that Mamie Thomas, one of the Dixie Furniture Mart employees who was up front when the robber came in and had an opportunity to observe him, was unable to identify McCleskey at the preliminary hearing, despite the fact that she was standing only a few feet from him. Given the contradictory descriptions' given by the witnesses at the store, the inability of Mamie Thomas to identify petitioner, and petitioner's repeated statements that he was not present at the scene, and the possible outcome of pursuing the only other defense available, the court cannot say that trial counsel's decision to pursue the alibi defense was unreasonable or constituted ineffective assistance of counsel.

[59] Having made a reasonable strategic choice to pursue an alibi defense, trial counsel could reasonably have decided not to interview all of the store employees. None of the statements produced by petitioner indicates that these employees would have contradicted the State's theory of the case. At best, they might have cumulatively created a reasonable doubt as to whether petitioner was the triggerman. This, however, was a defense counsel and petitioner had chosen not to pursue. Counsel had read their statements and concluded that none of these employees could identify McCleskey as the gunman who entered the front of the store. He also had the sworn testimony of at least one witness that McCleskey was definitely not the person who entered the front of the store. Under such circumstances the failure to interview the store employees was reasonable. See Washington v. Watkins. 655 F.2d 1346 (5th Cir. Unit A 1981), cert. denied, 456 U.S. 949, 102 S.Ct. 2021, 72 L.Ed.2d 474 (1982) (failure to interview in person the only eye

36. Although Mamie Thomas recanied her testimony immediately after the preliminary hearing, telling one of the detectives that she had lied because she was scared, and a later interview with her may have disclosed the change of testimony, this court cannot hold as a matter of law that counsel has a duty to disbelieve sworn testimony of a witness favorable to his client.

witness to an armed robbery and murder not ineffective assistance of counsel where client was asserting an alibi defense and telephone interview had established that witness could not identify or describe the gunman).<sup>34</sup>

[60] Slightly more troubling than the failure to interview the witnesses at the store was counsel's failure to interview the sheriff's deputies and Offie Evans prior to trial. Evans' testimony was certainly very damaging to petitioner, and a pretrial investigation as to what his testimony would be may have uncovered the details of his escape from a halfway house and the pending federal charges against him, his "understanding" with an Atlanta police detective, his history of drug use, and his imaginative story that he had gone to Florida and participated in an undercover drug investigation during his escape. Discovery of such evidence would have had substantial impeachment value. However, this court cannot find on the facts before it that counsel acted unreasonably in failing to interview Evans prior to trial. Although he recognized that at least one of the names in the prosecution's witness list was a Fulton County Sheriff's Deputy and suspected that a jailhouse confession might be forthcoming, counsel testified that McCleskey told him that he had made absolutely no incriminating statements to anyone in the Fulton County Jail. There has been no allegation that petitioner was incompetent or insane at any time during this proceeding. It would be anomalous, then, for this court to grant petitioner habeas corpus relief on the grounds that petitioner's counsel was ineffective because he did not disbelieve petitioner and undertake an independent investigation

[61] Finally, petitioner contends that his counsel was ineffective because he

In other words, counsel could reasonably believe that the witness sitestimony at trial would be substantially the same as it was at the preliminary hearing. When it turned out to be different counsel took the proper step of impeaching her later testimony with her testimony at the preliminary hearing. failed to interview the State's ballistics expert, Kelly Fite. However, a similar claim was rejected on similar facts in Washington v. Watkins, 655 F.2d at 1358. Petitioner's counsel had read the expert's report and was prepared adequately to cross-examine the expert at trial. The court does not believe, therefore, that the failure to interview the witness in person prior to trial constituted ineffective assistance of counsel.

# B. Performance During the Trial: Guilt/Innocence Phase.

[62] Petitioner also contends that counsel's conduct of the trial was deficient in several respects. First, petitioner contends that the failure to move for a continuance or a mistrial when he learned of the suggestive line-up procedure on the morning of the trial constituted ineffective assistance. However, the court has already concluded in Part X, supra, that there was nothing unconstitutional about the chance viewing of the defendants prior to trial. The viewing therefore would not have been grounds for a mistrial or a continuance. Failure to make a motion unwarranted in law is not ineffective assistance of counsel.

[63] Petitioner also contends that his counsel failed to object to admission of evidence regarding prior convictions and sentences for armed robbery. Petitioner makes the somewhat technical argument that because these convictions had been set aside by the granting of a motion for a new trial that they were inadmissible. Petitioner further contends that counsel did not object to this evidence because he had failed to investigate the circumstances of these convictions prior to trial." Assuming for the moment that the failure to investigate these convictions constituted ineffective assistance of counsel, the court is unconvinced that petitioner can show actual and substantial prejudice resulted from the ineffectiveness. See Washington v.

 Pursuant to Ga.Code Ann. § 27–2503(a) the State informed trial counsel on October 2, 1978 that it intended to offer in aggravation certain prior consistions and seniences of potitioner. Strickland, 693 F.2d 1243, 1262 (5th Cir. Unit B 1982) (en banc) cert. granted. -U.S. ---, 103 S.Ct. 2451, 77 L.Ed.2d 1332 (1983). First, petitioner does not contend that he was not guilty of those crimes. In fact, after being granted a new trial he pleaded guilty to them and received an 18-year sentence. The court has already held that under Georgia law those crimes were admissible to show that petitioner engaged in a pattern or practice of armed robberies. The court cannot say that counsel's failure to object to the introduction of this evidence at the guilt stage caused petitioner actual and substantial prejudice. Also, while the jury did learn that petitioner had received life sentences which had subsequently been set aside and this fact may have prejudiced them at the penalty stage of petitioner's trial,36 the court is unprepared to say that in the context of all of the evidence, the failure of counsel to object to the introduction of this evidence warrants petitioner a new trial. However, given the court's holding in Part III. supra, this point is essentially moot.

[64] Finally, petitioner contends that trial counsel was ineffective because he failed to object to the trial court's "overly broad instructions to the jury (1) with regard to presumptions of intent and (2) as to the use of 'other acts' evidence for proof of intent, and (3) as aggravating circumstances at the sentencing phase." Petitioner's September 20, 1983 Memorandum of Law in Support of Issuance of the Writ at 64 This court has already found that the trial court's instructions were not erroneous or overbroad. See Parts IV, VII and VIII. supra. Failure to object to the instructions was not, therefore, ineffective assistance of counsel.

#### C. Ineffective Assistance at Trial— Sentencing Phase

[65] Petitioner has contended that trial counsel was ineffective because he failed to

The convictions and sentences which petitioner contends were invalid were among those listed.

38. See note 25 supra

undertake an independent investigation to discover and produce mitigating evidence and witnesses to testify on behalf of petitioner at the sentencing phase of his trial. Trial counsel testified that he asked petitioner for names of persons who would be willing to testify for him and that petitioner was unable to produce a single name. Counsel also testified that he contacted petitioner's sister and that she also was unable to produce any names." A review of trial counsel's testimony at the state habeas hearing convinces this court that counsel made a reasonable effort to uncover mitigating evidence but could find none. Petitioner's sister declined to testify on her brother's behalf and told counsel that petitioner's mother was unable to testify because of illness. McCleskey v. Zant, H.C. No. 4909. Slip Op. at 19 (Sup.Ct. of Butts County. April 8, 1981). The record simply does not support a finding of actual and substantial prejudice to petitioner due to any ineffective assistance by petitioner's counsel at the sentencing phase of the trial.

#### D. Ineffective Assistance-Post-Trial.

[66] Petitioner contends that trial counsel was also ineffective in failing to correct inaccuracies and omissions in the trial judge's post-trial sentencing report. This report is used by the Georgia Supreme Court as part of its review of whether the sentence imposed was arbitrary, excessive, or disproportionate. While it was in part because the Georgia capital sentencing procedure provided such a review that the

39. The sister testified at the state habeas hearing that counsel never asked her for any names and that if he had done so she would have been ready, willing and able to produce a number of names. The habeas court specifically chose to credit the testimony of the trial counsel rather than the sister. See McCleskey v. Zant, H.C. No. 4909, Slip Op. at 19 (Sup.Ct. of Butts County. April 8, 1981). This finding of face is presumed to be correct. 28 U.S.C. § 2254(d).

Since the court has concluded that petitioner has been unable to show actual and substantial prejudice caused by any ineffective assistance of counsel, petitioner's Claim "P" is without merit.

#### XVII. CONCLUSION

For the reasons set forth in Part III, supra, it is ORDERED, ADJUDGED, and DECREED that petitioner's conviction for malice murder be set aside and that petitioner within one hundred eventy (120) days after this judgment becomes final as a result of the failure of respondent to lodge an appeal or as the result of the issuance of a mandate affirming this decision, whichever is later, be reindicted and tried, failing which this writ of habeas corpus without further order shall be made absolute.

- Georgia's capital sentencing procedure provides for the filing of a trial judges report to be part of the record reviewed by the Georgia Supreme Court on appeal. O.C.G.A. § 17-10-35.
- 41. For a discussion of proportionality analysis in Eighth Amendment jurisprudence see Comment "Down the Road Toward Human Decercy". Eighth Amendment Proportionality Analysis and Solem vs. Helm. 18 Oa.L.Rev. 109 (1983)

#### PADILLA v. d'AVIS Cite to 580 F.Supp. 403 (1984)

	B 102	952	3	3			2018	2 8 OLD D	Gloria PADILLA. Plaintiff.	
	ā	1					=1			Gioria PADILLA. Plantiti.
	2885	22	8	<b>8</b> §			DHE	8	22	Luis M. d'AVIS and City of Chicago, Defendants.
	200	ä	8				200	*	5	Anita JONES. Plaintiff.
	DRES	*	5	5 5			DHES	8 E Lui	Luis M. d'AVIS and City of Chicago, Defendants.	
	4	11		_			<b>4</b> 1			Nos. 83 C 6390, 82 C 2943.
	_	2	2 8	8			D879A		=	United States District Court, N.D. Illinois, E.D.
		=		9000			286	8	1	Feb. 1, 1984.
	2000	=	8	8			1100	*	8	Patients brought action against city and physician arising out of sexual assaults by physician during course of his gyneco-
	-	2	8	8		THE .	DRE	8	2 2 logical examinations of health facility. On a me	logical examinations of patients at city health facility. On a motion to reconsider
	VICTIE	2		1		EFEND	E 18 78	3	8	previous dismissal of one complaint, and defendants' motions to dismiss, the District Court, Shadur, J., held that: (1) patients
TABLE	RACE OF THE VICTI			8		RACE OF THE DEPENDANT	9	3	2	stated section 1983 cause of action against city: (2) physician was not engaged in
	NAC.	2	8	1		RACE	5883	8	=	"state action" and therefore patients failed to state a cause of action under section 1983 against him; and (3) patients failed to
		-	2	8			11874	9	=	state a cause of action under state law against city.
		- 18		Ē			0873	8	100	Ordered accordingly
	14	-					0.00	•	1	<ol> <li>Federal Civil Procedure   1829, 1835  On motion to dismiss, all factual alle-</li> </ol>
		iusted								gations in complaint are taken as true and all reasonable and factual inferences are drawn in favor of plaintiff.
				ž.			3			2. Civil Rights €13.17(7)
					-		=			A city has no punitive damages liability under section 1983. 42 U.S.C.A. § 1983.
				7		10				3. Civil Rights =13.7
			Incremental Increase in	Death Sentencing Hate "P" Value				acremental Increase to	P. Value	Absent some formally promulgated standard of conduct, such as an ordinance or administrative regulation, a section 1983 cause of action against a municipality must

#### Federal Civil Procedure €1829, 1835

## Civil Rights =13.17(7)

#### Civil Rights =13.7

Absent some formally promulgated undard of conduct, such as an ordinance r administrative regulation, a section 1983 cause of action against a municipality must be grounded on some direct municipal act or omission or some municipal policy, custom or practice that in either event proxi-

#### Appendix C -

. .

make mander and in

1 . . . . .

. 1 4"

To a distant

HATTER AND THE COMMENTS WITH THE PARTY OF TH

Order of the Court of Appeals, dated March 26, 1985 denying rehearing IN THE UNITED STATES COURT OF APPEAUS COURT OF APPEAUS
FOR THE ELEVENTH CIRCUIT BEVENTH CIRCUIT

FILED

No. 84-8176

MAR 2 3 1985

SPENCER D. MERCER CLERK

WARREN MCCLESKEY,

Petitioner-Appellee, Cross-Appellant,

versus

RALPH KEMP, Warden,

Respondent-Appellant, Cross-Appellee.

On Appeal from the United States District Court for the Northern District of Georgia

(March 26, 1985 )

Before GODBOLD, Chief Judge, RONEY, TJOFLAT, HILL, FAY, VANCE, KRAVITCH, JOHNSON, HENDERSON, HATCHETT, ANDERSON and CLARK, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby Quie!

ENTERED FOR THE COURT:

UNITED STATES CIRCUIT JUDGE

Appendix D -

King you for you to the state of the

4 217 12

Start of the start

all tenants and the state of th

A THE RESERVE OF THE PARTY OF T

the interest of the state of the same

the same of the sa

To the second

177, 447 -

. ...

Per Paris

La part of

ALL PROPERTY.

Statutory Provisions Involved

## STATUTORY PROVISIONS INVOLVED

#### Ga. Code Ann. § 26-603:

The acts of a person of sound mind and discretion are presumed to be the product of the person's will, but the presumption may be rebutted.

# Ga. Code Ann. § 26-604:

A person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts, but the presumption may be rebutted.

## Ga. Code Ann. \$ 26-1101:

- (a) A person commits murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being. Express malice is that deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances capable of proof. Malice shall be implied where no considerable provocation appears, and where all the circumstances of the killing show an abandoned and malignant heart.
- (b) A person also commits the crime of murder when in the commission of a felony he causes the death of another human being, irrespective of malice.

## Ga. Code Ann. § 59-806(4):

"Are you concientiously opposed to capital punishment?" If he shall answer the question in the negative, he shall be held a competent juror. Provided, nevertheless, that either the State or the defendant shall have the right to introduce evidence before the judge to show that the answers, or any of them, are untrue; and it shall be the duty of the judge to determine upon the truth of such answers as may be thus questioned before the court.

# Ga. Code Ann. § 59-807:

If a juror shall answer any of the questions set out in the preceding section so as to render him incompetent, or he shall be so found by the judge, he shall be set aside for cause.

# Appendix E -

A STATE OF THE PARTY OF THE PAR

MAD VA

Car Synthony

Que . . . 1

Secretary.

4.

Lab very

1.55

Statements of Facts from Petitioner's Post-Bearing Memorandum of Law in Support of His Claims of Arbitrariness and Racial Discrimination, submitted to the District Court in McCleskey v. Eant, No. C81-2434A; and Statement of Facts from En Banc Brief for Petitioner McCleskey, submitted to the Court of Appeals in McCleskey v. Kemp, No. 84-8176.

agreement the start buy and .

The server of the real first that the server of the server

#### IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

		-x	
WARREN McCLESK	EY,	)	
	Petitioner,	)	
-agai	)	CIVIL ACTION NO. C81-2434A	
WALTER D. ZANT Georgia Diagno Center,	)		
	Respondent.	)	
		-X	

PETITIONER'S POST-BEARING MEMORANDUM OF LAW IN SUPPORT OF BIS CLAIMS OF ARBITRARINESS AND RACIAL DISCRIMINATION

> ROBERT H. STROUP 1515 Healy Building Atlanta, Georgia 30303

JOHN CHARLES BOGER 10 Columbus Circle New York, New York 10019

TIMOTHY K. FORD 600 Pioneer Building Seattle, Washington 94305

ANTHONY G. AMSTERDAM
New York University Law School
40 Washington Square South
New York, New York, 10012

ATTORNEYS FOR PETITIONER

invitation. In it, petitioner will first outline the evidence presented to the Court, and then state the legal foundations of his constitutional claims.

# STATEMENT OF FACTS

- Petitioner's Case-in-Chief
  - A. Professor David Baldus
    - 1. Areas of Expertise

Petitioner's first expert witness was Professor David C.

Baldus, currently Distinguished Professor of Law at the University of Iowa. Professor Baldus testified that a principal focus of his academic research and writing during the past decade has been upon the use of empirical social scientific research in legal contexts. During that time, Professor Baldus has co-authored a widely cited (see DB6) work on the law of discrimination, see D. BALDUS & J. COLE, STATISTICAL PROOF OF DISCRIMINATION (1980), as well as a number of significant articles analyzing the use of statistical techniques in the assessment of claims of

<sup>3/</sup> Due to the length and complexity of the evidentiary hearing, and the fact that no transcript of the testimony has yet been completed, petitioner does not purport to set forth a comprehensive statement of the evidence in this memorandum. Instead, the statement of facts will necessarily be confined to a review of the principal features of the evidence.

<sup>4/</sup> Each reference to petitioner's exhibits will be indicated by a reference to the initials of the witness during whose testimony the exhibit was offered (e.g., David Baldus becomes "DB"), followed by the exhibit number.



has served as a consultant to an eminent Special Committee on Empirical Data on Legal Decision-Making of the Association of the Bar of the City of New York.

After hearing his qualifications, the Court accepted Professor Baldus as an expert in "the empirical study of the legal system, with particular expertise in methods of analysis and proof of discrimination in a legal context."

# Development of Research Objectives

Professor Baldus testified that he first became interested in empirical research on a state's application of its capital puhishment statutes shortly after Gregg v. Georgia, 428 U.S. 153 (1976) and related cases had been announced by the Supreme Court in mid-1976. Those cases, Baldus explained, explicitly rested upon certain assumptions about how the post-Purman capital statutes would operate: (i) that sentencing decisions would be guided and limited by the criteria set forth in capital statutes; (ii) that under such statutes, cases would receive evenhanded treatment; (iii) that appellate sentence review would guarantee statewide uniformity of treatment, by correcting any significant disparities in local disposition of capital cases; and (iv) that the influenced of illegitimate factors such as race or sex, would be eliminated by these sentencing constraints on prosecutorial and jury discretion.

Professor Baldus testified that his own research and training led him to conclude that the Supreme Court's assump-

tions in Gregg were susceptible to rigorous empirical evalution employing accepted statistical and social scientific methods. Toward that end -- in collaboration with two colleagues, Dr. George Woodworth, an Associate Professor of Statistics at the University of Iowa, and Professor Charles Pulaski, a Professor of Criminal Law now at Arizona State University Law School --Baldus undertook in 1977 the preparation and planning of a major research effort to evaluate the application of post-Furman capital statutes. In the spring semester of 1977, Professor Baldus began a review of previous professional literature on capital sentencing research and related areas, which eventually comprised examination of over one hundred books and articles. Baldus and his colleagues also obtained access to the most well-known prior data sets on the imposition of capital sentences in the United States, including the Wolfgang rape study which formed the empirical basis for the challenge brought in Maxwell v. Bishop, 398 F.2d 138 (8th Cir. 1968), rev'd on other grounds, 398 U.S. 262 (1970), and the Stanford Law School study. They examined the questionnaires em-

Baldus testified that his research was particularly aided by other pioneering works on racial discrimination in the application of capital statutes, see, e.g., Johnson, "The Negro and Crime," 217 ANNALS 93 (1941); Garfinkel, "Research Note on Inter- and Intra- Racial Homicide," 27 SOCIAL FORCES 369 (1949); Inter- and Intra- Racial Homicide," 27 SOCIAL FORCES 369 (1949); Wolfgang & Riedel, "Race, Judicial Discretion, and the Death Wolfgang & Riedel, "Rape, Race, Penalty," 407 ANNALS 119 (1973); Wolfgang & Riedel, "Rape, Race, and the Death Penalty in Georgia," 45 AM. J. ORTHO PSYCHIAT. 658 (1975); Bowers & Pierce, "Arbitrariness and Discrimination under Post-Furman Capital Statutes," 26 CRIME & DELING. 563 (1980).

<sup>9/</sup> See "A Study of the California Penalty Jury in First Degree Murder Cases," 21 STAN. L. REV. 1297 (1969).

ployed in those studies, reran the analyses conducted by prior researchers, and ran additional analyses to learn about factors which might be important to the conduct of their own studies:

After these preliminary investigations, Baldus and his colleagues began to formulate the general design of their own research. They settled upon a retrospective non-experimental study as the best available general method of investigation.

They then chose the State of Georgia as the jurisdiction for study, based upon a consideration of such factors as the widespread use in other jurisdictions of a Georgia-type capital statute, the favorable accessibility of records in Georgia, and numbers of capital cases in that state sufficiently large to meet statistical requirements for analysis of data.

# 3. Procedural Reform Study ("PRS")

The first of the two Baldus studies, the Procedural Reform Study, was a multi-purpose effort designed not only to address the question of possible discrimination in the admin-

To Under such a design, researchers gather data from available records and other sources on plausible factors that might have affected an outcome of interest (here the imposition of sentence in a homicide case) in cases over a period of time. They then used statistical methods to analyze the relative incidence of those outcomes dependent upon the presence or absence of the other factors observed. Professor Baldus testified that this method was successfully employed in, among others, the National Halothane Study, which Baldus and his colleagues reviewed carefully for methodological assistance.

<sup>11/</sup> Baldus testified that he made inquiry of the Georgia Department of Offender Rehabilitation, the Georgia Department of Pardons and Paroles, and the Georgia Supreme Court, all of which eventually agreed to make their records on homicide cases available to him for research purposes. (See DB 24.)

istration of Georgia's capital statutes, but to examine appellate sentencing review, pre- and post-<u>Furman</u> sentencing, and other questions not directly relevant to the issues before this Court. Professor Baldus limited his testimony to those aspects and findings of the PRS germane to petitioner's claims.

The PRS, initially supported by a small grant from the University of Iowa Law Foundation, subsequently received major funding for data collection from the National Institute of Justice, as well as additional funds from Syracuse University Law School. Work in the final stages of data analysis was assisted by a grant from the Edna McConnell Clark Foundation distributed through the NAACP Legal Defense and Educational Pund, Inc. Research data collection and analysis for the PRS took place from 1977 through 1983.

# a. Design of PRS

In formulating their research design for the PRS, Baldus and his colleagues first identified the legal decision-points within the Georgia charging and sentencing system which they would study and then settled upon the "universe" of cases on which they would seek information. After reviewing the various stages which characterize Georgia's procedure for the disposition of homicide cases (see DB21), Baldus decided to focus the PRS on two decision-points: the prosecutor's decision whether to seek a death sentence once a murder conviction had been obtained

at trial; and the jury's sentencing verdict following a penalty trial. Baldus defined the universe of cases to include all persons arrested between the effective date of Georgia's post-Purman capital statute, March 28, 1973, and June 10, 1978 (i) who were convicted of murder after trial and received either life or death sentences, or (ii) who received death sentences after a plea of guilty, and who either (i) appealed their cases to the Supreme Court of Georgia (ii) or whose cases appeared in the files of both the Department of Offender Rehabilitation ("DOR") and the Department of Pardons and Paroles ("DPP"). This universe comprised 594 defendants. (See DB 26.) Penalty trials had occurred in 193 of these cases, including 12 in which two or more penalty trials had taken place, for a total of 206 penalty trials. In all, 113 death sentences had been imposed in these 206 trials.

For each case within this universe, Baldus and his colleagues proposed to collect comprehensive data on the crime, the defendant, and the victim. Factors were selected for inclusion in the study based upon the prior research of Baldus, a review of questionnaires employed by other researchers such as Wolfgang as well as upon the judgment of Baldus, Pulaski and others about what factors might possibly influence prosecutors

- 9 -

<sup>12/</sup> The decision to limit the universe to cases in which a murder conviction or plea had been obtained minimized concern about difference in the strength of evidence of guilt. The decision to limit the universe to cases in which an appeal had been taken or in which DOR and DPP files appeared was a necessary restriction based upon availability of data.

and juries in their sentencing decisions. The initial PRS questionnaire, titled the "Supreme Court Questionnaire," was drafted by Baldus working in collaboration with a law school graduate with an advanced degree in political science, Frederick Kyle (see DB 27), and went through many revisions incorporating the suggestions of Pulaski, Woodworth, and others with whom it was shared. In final form, the Supreme Court Questionnaire was 120 pages in length and addressed over 480 factors or "variables. After preliminary field use suggested the unwieldiness of the Supreme Court Questionnaire, and after analysis revealed a number of variables which provided little useful information, a second, somewhat more abbreviated instrument, titled the Georgia Parole Board (or Procedural Reform Study) Questionnaire, was developed (see DB 35). Much of the reduction in size of this second questionnaire came from changes in its physical design to re-format the same items more compactly. Other variables meant to permit a coder togindicate whether actors in the sentencing process had been "aware" of a particular variable were dropped as almost impossible to determine from available records in most instances. A few items were added to the second questionnaire. Eventually, information on 330 cases was coded onto the Supreme Court Questionnaire, while information on 351 cases was coded onto the Georgia Parole Board Questionnaire. Eighty-seven cases were coded onto both questionnaires. (See DB 28, at 2.1

## b. Data Collection for PRS

Data collection efforts for the PRS began in Georgia during the summer of 1979. Baldus recruited Frederick Kyle, who had assisted in drafting the Supreme Court Questionnaire, and two other students carefully selected by Baldus for their intelligence and willingness to undertake meticulous detail work. Initially, the Supreme Court Questionnaires were filled out on site in Georgia; quickly, however, it became evident that because of the unwieldiness of that questionnaire, a better procedure would be to gather information in Georgia which would later be coded onto the questionnaires at the University of Iowa. Several items were collected for this purpose, including: (i) a Georgia Supreme Court opinion, if one had been rendered (see DB 29); (ii) a trial judge's report prepared pursuant to Ga. Code Ann. § 27-2537(a), if one was available in the Georgia Supreme Court (see DB 30); (iii) a "card .ummary" prepared by the Assistant to the Supreme Court of Georgia, if available (see DB 31); a procedural record of the case (see DB 32); (iv) an abstract of the facts, dictated or prepared by the coders in Georgia from the appellate briefs in the case, supplemented by transcript information (see DB 33); and a narrative summary of the case (see DB 3, at 3).

In addition to those data sources, Baldus and his colleagues relied upon basic information on the crime, the defendant and the victim obtained from the Department of Pardons and Paroles, information on the defendant obtained from the Department of Offender Rehabilitation, information on the sex, race and age

of the victim -- if otherwise unavailable -- obtained from Georgia's Bureau of Vital Statistics, as well as information on whether or not a penalty trial had occurred, obtained from counsel in the cases if necessary (see DB 28; DB 36).

The 1979 data collection effort continued in the fall of 1980 under the direction of Edward Gates, a Yale graduate highly recommended for his care and precision by former employers at a Yale medical research facility. Baldus trained Gates and his co-workers during a four-day training session in August, 1980, in the office of Georgia's Board of Pardons and Paroles, familiarizing them with the documents, conducting dry run tests in questionnaire completion, and discussing at length any problems that arose. To maintain consistency in coding, Baldus developed a set of rules or protocols governing coding of the instruments, which were followed by all the coders. These protocols were reduced to written form, and a copy was provided to Gates and other coders in August of 1980. Baldus, who returned to Iowa, remained in contact with Gates daily by telephone, answering any questions that may have arisen during the day's coding.

C. Data Entry and Cleaning for PRS
To code the abstracts and other material forwarded

<sup>13/</sup> While information on most of the cases in the PRS was gathered in 1979 and 1980, Edward Gates completed the collection effort in the final 80 cases during the summer of 1981. (See DB 28, at 2.)

from Georgia onto the Supreme Court and PRS questionnaires,
University of Iowa law students with criminal law course experience, again chosen for intelligence, diligence, and care
in detailed work. The students received thorough training
from Professors Baldus and Pulaski, and they worked under the
supervision of Ralph Allen, a supervisor who checked each
questionnaire. The students held regular weekly meetings to
discuss with Professor Baldus and their supervisor any
problems they had encountered, and consistent protocols were
developed to guide coding in all areas.

Professor Baldus hired the Laboratory for Political Research at the University of Iowa to enter the data onto magnetic computer tape. Rigorous procedures were developed to ensure accurate transposal of the data, including a special program to signal the entry of any unauthorized codes by programmers. A printout of the data entered was carefully read by professionals against the original questionnaires to spot any errors, and a worksheet recorded any such errors for correction on the magnetic tapes (see DB 50).

# Charging and Sentencing Study ("CSS")

In 1980, Professor Baldus was contacted for advice by the NAACP Legal Defense Pund in connection with a grant application being submitted to the Edna McConnell Clark Poundation seeking funds to conduct social scientific research into the death

penalty. Several months later, the Legal Defense Fund informed Baldus that the grant had been approved and invited him to conduct the research. Under that arrangement, the Legal Defense Fund would provide the funds for the out-of-pocket expenses of a study, ceding complete control over all details of the research and analysis to Professor Baldus (apart from the jurisdiction to be studied, which would be a joint decision). Once the analysis had been completed, Baldus would be available to testify concerning his conclusions if the Legal Defense Pund requested, but Baldus would be free to publish without restriction whatever findings the study might uncover. After some further discussions, the parties agreed in the fall of 1980 to focus this Charging and Sentencing Study (\*CSS\*) on the State of Georgia.

#### a. Design of CSS

The CSS, by focusing once again on the State of Georgia, permitted Professor Baldus and his colleagues to enlarge their PRS inquiry in several important respects: first, they were able, by identification of a different universe, to examine decision-points in Georgia's procedural process stretching back to the point of indictment, thereby including information on prosecutorial plea-bargaining decisions as well as jury guilt determinations; secondly, they broadened their inquiry to include

<sup>14/</sup> Baldus indeed expressly informed LDF at the outset that his prior analysis of the Stanford Study data left him skeptical that any racial discrimination would be uncovered by such research.

cases resulting in voluntary manslaughter convictions as well as murder convictions; and thirdly by development of a new questionnaire, they were able to take into account strength-of-evidence variables not directly considered in the PRS. Beyond these advances, the deliberate overlapping of the two related studies provided Professor Baldus with a number of important means to confirm the accuracy and reliability of each study.

To obtain these benefits, Baldus defined a universe including all offenders who were arrested before January 1, 1980 for a homicide committed under Georgia's post-Furman capital statutes, who were subsequently convicted of murder or of voluntary manslaughter. From this universe of 2484 cases, Professors Baldus and Woodworth drew two samples.  $\frac{15}{}$  The first, devised according to statistically valid and acceptable sampling procedures (see the testimony of Dr. Woodworth, infra), comprised a sample of 1066 cases, stratified to include 100% of all death-sentenced cases. 100% of all life-sentenced cases afer a penalty trial, and a random sample of 41% of all life-sentenced cases without a penalty trial, and 35% of all voluntary manslaughter cases. The stratification had a second dimension; Professors Baldus and Woodworth designed the sample to include a minimum 25% representation of cases from each of Georgia's 42 judicial circuits to ensure full statewide coverage.

<sup>15/</sup> As indicated above, the PRS did not involve any sampling procedures. All cases within the universe as defined were subject to study.

<sup>16/</sup> Because of the unavailability of records on one capitallysentenced inmate, the final sample includes only 99% (127 of 128) of the death-sentenced cases.

The second sample employed by Baldus and Woodworth in the CSS included all penalty trial decisions known to have occurred during the relevant time period, on which records were available, a total of 253 of 254. Among those 253, 237 also appeared in the larger CSS Stratified Sample of 1066; the remaining 16 cases comprised 13 successive penalty trials for defendants whose initial sentences had been vacated, as well as 3 cases included in Georgia Supreme Court files, but not in the file of the Department of Offender Rehabilitation. (This latter sample, of course, permitted Baldus to analyze all penalty decisions during the period. In his analyses involving prosecutorial decisions, Baldus explained that, since a prosecutor's treatment on the first occasion inevitably would affect his disposition of the second, it could be misleading to count two dispositions of a defendant by a single decisionmaker on successive prosecutions. When two separate sentencing juries evaluated a capital defendant, however, no such problems arose. The two samples permitted both analyses to be employed throughout the CSS, as appropriate.)

After a universe had been defined and a sample drawn, Baldus began development of a new questionnaire. Since the CSS sought to examine or "model" decisions made much earlier in the charging and sentencing process than those examined in the PRS, additional questions had to be devised to gather information on such matters as the plea bargaining process and jury conviction trials. A second major area of expansion was the effort to obtain information on the strength of the evidence, an especially

important factor since this study included cases originally charged as murders which resulted in pleas or convictions for manslaughter. Professor Baldus devised these strength-of-evidence questions after a thorough review of the professional literature and consultation with other experts who had also worked in this area. The final CSS questionnaires (see DB 38) also included additional variables on a defendant's prior record and other aggravating and mitigating factors suggested by professional colleagues, by attorneys and by preliminary evaluation of the PRS questionnaires.

# b. Data Collection for CSS

Data for the CSS were collected from essentially the same sources used for the PRS: the Department of Pardons and Paroles, the Department of Offender Rehabilitation (see DB 40), the Supreme Court of Georgia, the Bureau of Vital Statistics (see DB 47), supplemented by limited inquiries to individual attorneys to obtain information on whether plea bargains occurred, whether penalty trials occurred, and the status (retained or appointed) of defense counsel (see DB 45, at 3-6; DB 46) (see generally DB 39).

Physical coding of the CSS questionnaires was completed directly from the official records in Georgia by five law students working under the supervision of Edward Gates, who had been one of Baldus' two coders for the PRS in Georgia in 1980. The five students were selected by Baldus after a nationwide recruitment effort at 30 law schools; once again, Baldus

or Gates contacted references of the strongest candidates before hiring decisions were made (see DB 42).

As in the PRS, an elaborate written protocol to govern data entries was written, explained to the coders, and updated as questions arose. (See DB 43.) After a week-long training session in Atlanta under the supervision of Professor Baldus, Gates and the law students remained in contact with Baldus throughout the summer to resolve issues and questions that arose.

#### B. Edward Gates

At this point during the evidentiary hearing, petitioner presented the testimony of Edward Gates who, as indicated above, was integrally involved in data collection efforts both in the PRS and in the CSS. Gates testified that he was a 1977 graduate of Yale University, with a Bachelor of Science degree in biology. Pollowing his undergraduate training, Gates worked as a research assistant in the Cancer Research Laboratory of Tufts Medical School, developing data sets on cellular manipulation experiments, recording his observations and making measurements to be used in this medical research. (See EG 1.)

#### 1. Data Collection for PRS

Gates testifies that he was hired by Professor Baldus in August of 1980 to collect data for the PRS. Prior to travelling to Georgia, he was sent coding instructions and practice questionnaires to permit him to begin his training. During mid-

September, 1980, he met with Baldus in Atlanta, reviewed the practice questionnaires, and met with records officials in the Georgia Archives (where Supreme Court records were stored) and in the Department of Pardons and Paroles. After several additional days of training and coding practice, he worked at the Archives each workday from mid-September until late October, 1980, reviewing trial transcripts, appellate briefs, trial judges's reports, and Supreme Court opinions before preparing abstracts and a narrative summary.

Gates testified that he followed the written coding procedures throughout, and that problems or inconsistencies were discussed with Professor Baldus each day at 4:00 p.m. When changes in coding procedures were made, Gates testified that he checked previously coded questionnaires to ensure consistent application of the new protocols.

In late October, coding work moved from the Archives to the Pardons and Paroles offices. There, Gates had access to police report summaries completed by Pardons and Paroles investigators, Pederal Bureau of Investigation "rap sheets," field investigator reports on each defendant, and sometimes actual police or witness statements. Gates pointed out an illustrative example of a case he had coded (see DB 34) and reviewed at length the coding decisions he made in that case, one of over 200 he coded employing the Procedural Reform Study questionnaire. In response to questioning from the court, Gates explained that his instructions in coding the PRS questionnaire were to draw

reasonable inferences from the file in completing the foils. (These instructions later were altered, Gates noted, for purposes of the coding of the CSS questionnaire.)

Gates left Georgia in mid-January of 1981; he completed the final PRS questionnaires during the summer of 1981, during his tenure as supervisor of the CSS data collection effort in Atlanta.

# 2. Data Collection for CSS

During early 1981, Gates was invited by Professor Baldus to serve as project supervisor of the CSS data collection effort. In the spring of 1981, he worked extensively with Baldus on a draft of the CSS questionnaire, assisted in hiring the coders for the 1981 project, and drafted a set of written instructions for the coders (see DB 4).

Gates came to Georgia in late May of 1981, participated with Professor Baldus in a week-long training session with the five law student coders, and then supervised their performance throughout the summer. He reviewed personally the files and questionnaries in each of the first one hundred cases coded by the students, to ensure consistency, and thereafter he regularly reviewed at least one case each day for each coder. At least twice during the summer, Gates gave all coders the same file and asked them to code and cross-check the results with those completed by the other coders. Gates spoke frequently by telephone with Baldus and discussed problems that arose in interpretation on a daily basis. As in earlier collection

efforts, the protocols resolving questions of interpretation were reduced to written form, the final end-of-summer draft of which is incorporated in DB 43 (EG 5). Gates testified that he made great efforts to ensure that all questionnaires were coded consistently, revising all previous coded questionnaires when a disputed issue was subsequently resolved.

Gates noted that for the CSS questionnaire, coders were given far less leeway than in the PRS to draw inferences from the record. Moreover, in the event of unresolved conflicting statements, they were instructed to code in a manner that would support the legitimacy of the conviction and sentence imposed in the case.

In sum, Gates testified that while the data for the PRS was very carefully coded, the data effort for the CSS was even more thoroughly entered, checked and reviewed. Both data collection efforts followed high standards of data collection, with rigorous efforts made to insure accuracy and consistency.

# C. Professor David Baldus (resumed)

# 1. Data Entry and Cleaning for CSS

Upon receipt of six boxes of completed CSS questionnaires at the end of August, 1981, Professor Baldus testified that he faced five principal tasks before data analysis could begin. The first was to complete collection of any missing data, especially concerning the race of the victim, the occurrence of a plea bargain, and the occurrence of a penalty trial in lifesentenced cases. As in the PRS study, he accomplished this

task through inquiries directed to the Bureau of Vital Statistics
(see DB 47) and to counsel in the cases (see DB 45-46). Bis
second task was the entry of the data onto magnetic computer
tapes, a responsibility performed under contract by the Laboratory
for Political Science. The program director subsequently reported
to Professor Baldus that, as as result of the careful data entry
procedures employed, including a special program that immediately
identified the entry of any unauthorized code, the error remaining
in the data base as a result of the data entry process is estimated
to be less than 1/6 of 1 percent, and that the procedures he had
followed conform to accepted social science data entry practices.

Baldus' third task was to merge magnetic tapes created by the Political Science Laboratory, which contained the data collected by his coders in Georgia, with the magnetic tapes provided by the Department of Offender Rehabilitation, which contained personal data on each offender. This was accomplished through development of a computer program under the supervision of Professor Woodworth. Next, Professors Baldus and Woodworth engaged in an extensive data "cleaning" process, attempting through various techniques -- crosschecking between the PRS and CSS files, manually comparing entries with the case summaries, completing crosstabular computer runs for consistency between two logically related variables -- to identify any coding errors in the data. Of course, upon identification,

Baldus entered a program to correct the errors. (See DB 51).

The final step preceding analysis was the "recoding" of variables from the format in which they appeared on the CSS questionnaire into a binary form appropriate for machine analysis. Professor Baldus performed this recoding (see DB 54, DB 55), limiting the study to 230+ recoded variables considered relevant for an assessment of the question at issue: whether Georgia's charging and sentencing system might be affected by racial factors.

# 2. Methods of Analysis

As the data was being collected and entered, Professor

Baldus testified that he developed a general strategy of

analysis. First, he would determine the patterns of homicides in

Georgia and any disparities in the rate of imposition of death

sentence by race. Then he would examine a series of alternative

hypotheses that might explain any apparent racial disparities.

Among these hypotheses were that any apparent disparities could

be accounted for: (i) by the presence or absence of one or

more statutory aggravating circumstances; (ii) by the presence

or absence of mitigating circumstances; (iii) by the strength of

the evidence in the different cases; (iv) by the particular time

period during which the sentences were imposed; (v) by the

geographical area (urban or rural) in which the sentences were

imposed; (vi) by whether judges or juries imposed sentence;

Among the approximately 500,000 total entries in the CSS study, Professor Baldus testified that he found and corrected a total of perhaps 200 errors.

(vii) by the stage of the charging and sentencing system at which different cases were disposed; (viii) by other, less clearly anticipated, but nevertheless influential factors or combinations of factors; or (ix) by chance.

Professor Baldus also reasoned that if any racial disparities survived analysis by a variety of statistical techniques,
employing a variety of measurements, directed at a number of
different decision-points, principles of "triangulation" would
leave him with great confidence that such disparities were real,
persistent features of the Georgia system, rather than statistical artifacts conditioned by a narrow set of assumptions or
conditions.

For these related reasons, Professor Baldus and his colleagues proposed to subject their data to a wide variety of analyses, attentive throughout to whether any racial disparities remained stable.

# Analysis of Racial Disparities a. Unadjusted Measures of Disparities

Before subjecting his data to rigorous statistical analyses, Professor Baldus spent time developing a sense for the basic, unadjusted parameters of his data which could thereby inform his later analysis. He first examined the overall homicide and death sentencing rates during the 1974-1979 period (see DB 57), the disposition of homicide cases at

<sup>18/</sup> Unless otherwise indicated, the Baldus exhibits reflect data from the CSS.

successive stages of the charging and sentencing process (see DB 58; DB 59) and the frequency distraction of each of the CSS variables among his universe of cases (see DB 60).

Next, Baldus did unadjusted analyses to determine whether the race-of-victim and race-of-defendant disparities reported by earlier researchers in Georgia would be reflected in his data as well. In fact, marked disparities did appear: while death sentences were imposed in 11 percent of white victim cases, death sentences were imposed in only 1 percent of black victim cases, a 10 point unadjusted disparity (see DB 62). While a slightly higher percentage of white defendants received death sentences than black defendants (.07 vs. .04) (id.), when the victim/offender racial combinations were separated out, the pattern consistently reported by earlier researchers appeared:

Black Def./	White Def./	Black Def./	White Def./
White Vic.	White Vic.	Black Vic.	Black Vic.
.22 (50/228)	.08 (58/745)	(18/1438)	(2/64)

# - b. Adjusted Measures of Disparities

Baldus testified, of course, that he was well aware that these unadjusted racial disparities alone could not decisively answer the question whether racial factors in fact play a real and persistent part in the Georgia capital sentencing system. To answer that question, a variety of additional explanatory factors would have to be considered as well. Baldus illustrated this point by observing that although the unadjusted impact of the presence or absence of the "(b)(8)" aggravating

circumstance on the likelihood of a death sentence appeared to be 23 points (see DB 61), simultaneous consideration or "control" for both (b)(8) and a single additional factor — the presence or absence of the "(b)(10)" statutory factor — reduced the disparities reported for the (b)(8) factor from .23 to .04 in cases with (b)(10) present, and to -.03 in cases without the (b)(10) factor. (See DB 64.)

Baldus explained that another way to measure the impact of a factor such as (b)(8) was by its coefficient in a least squares regression. That coefficient would reflect the average of the disparities within each of the separate subcategories, or cells (here two cells, one with the (b)(10) factor present, and one with (b)(10) absent). (See DB 64; DB 65.) Still another measure of the impact of the factor would be by the use of logistic regression procedures, which would produce both a difficult-to-interpret coefficient and a more simply understood "death odds multiplier," derived directly from the logistic coefficient, which would reflect the extent to which the presence of a particular factor, here (b)(8), might multiply the odds that a case would receive a death sentence. Baldus testimed that,

<sup>19/</sup> O.C.G.A. \$ 17-10-30.(b)(8) denominates the murder of a peace officer in the performance of his duties as an aggravating circumstance.

<sup>20/</sup> O.C.G.A. § 17-10-30.(b)(10) denominates murder committed to avoid arrest as an aggravated murder.

 $<sup>\</sup>frac{21}{(5)}$  DB 64 reflects that the least squares coefficient for the  $\frac{21}{(5)}$  (8) factor was .02, the logistic coefficient was -.03, and the "death odds" multiplier was .97.

by means of regular and widely-accepted statistical calculations, these measures could be employed so as to assess the independent impact of a particular variable while controlling simultaneously for a multitude of separate additional variables.

Armed with these tools to measure the impact of a variable after controlling simultaneously for the effects of other variables, Professor Baldus began a series of analyses involving the race of the victim and the race of the defendant — first controlling only for the presence or absence of the other racial factor (see DB 69; DB 70), then controlling for the presence or absence of a felony murder circumstance (see DB 71; DB 72; DB 73), then controlling for the presence or absence of a serious prior record (see DB 74), then controlling simultaneously for felony murder and prior record (see DB 77), and finally controlling simultaneously for nine statutory aggravating circumstances as well as prior record (see DB 78). In all these analyses, Baldus found that the race of the victim continued to play a substantial, independent role, and the race of the defendant played a lesser, somewhat more marginal, but not insignificant role as well.

Professor Baldus testified concerning another important measure which affected the evaluation of his findings — the measure of statistical significance. Expressed in parentheses throughout his tables and figures in terms of "p" values, (with a p-value of.10 or less being conventionally accepted as "marginally significant," a p-value of .05 accepted as "significant," and a p-value of .01 or less accepted as "highly statisticaly significant"), this measure p computes the likelihood that, if in the universe as a whole no real differences exist, the reported differences could have been derived purely by chance. Baldus explained that a p-value of .05 means that only one time in twenty could a reported disparity have been derived by chance if, in fact, in the universe of cases, no such disparity existed. A p-value of .01 would reflect a one-in-one hundred likelihood, a p-value of .10 a ten-in-one hundred likelihood, that chance alone could explain the reported disparity.

Baving testified to these preliminary findings, F Baldus turned then to a series of more rigorous analy: petitioner expressly contended to the court were responsive to the criteria set forth by the Circuit Court in Smith v. Balkcom, 671 F.2d 858 (5th Cir. Unit B 1982) (on rehearing.). In the first of these (DB 79), Baldus found that when he took into account or controlled simultaneously for all of Georgia's statutory aggravating circumstances, as well as for 75 additional mitigating factors, both the race of the victim and the race of the defendant played a significant independent role in the determination of the likelihood of a death sentence. Measured in a weighted least squares regression analysis, race of victim displays a .10 point coefficient, a result very highly statistically significant at the 1-in-1000 level. The logistic coefficient and the death odds multiplier of 8.2 are also very highly statistically significant. The race of defendant effect measured by least squares regression was .07, highly statistically significant at the 1-in-100 level; employing logistic measures, however, the race of defendant coefficient was not statistically significant, and the death odds multiplier was 1.4.

Because the stratified CSS sample required weighting under accepted statistical techniques, a weighted least squares regression result is reflected. As an alternative measurement, Professor Baldus performed the logistic regression here on the unweighted data. Both measures show significant disparities.

Professor Baldus next reported the race-of-victim and defendant effects measured after adjustment or control for a graduated series of other factors, from none at all, to over 230 factors — related to the crime, the defendant, the victim, co-perpetrators as well as the strength of the evidence — simultaneously. (See DB 80.) Professor Baldus emphasized that as controls were imposed for additional factors, although the measure of the race-of-victim effect diminished slightly from .10 to .06, it remained persistent and highly statistically significant in each analysis. The race of defendant impact, although more unstable, nevertheless reflected a .06 impact in the analysis which controlled for 230+ factors simultaneously, highly significant at the 1-in-100 level.

Professor Baldus attempted to clarify the significance of these numbers by comparing the coefficients of the race-of-victim and race-of-defendant factors with those of other important factors relevant to capital sentencing decisions. Exhibit DB 81 reflects that the race of the victim factor, measured by weighted least squares regression methods, plays a role in capital sentencing decisions in Georgia as significant as the (i) presence or absence of a prior record of murder, armed robbery or rape (a statutory aggravating circumstance -- (b)(1)); (ii) whether the defendant was the prime mover in planning the homicide, and plays a role virtually as

<sup>24/</sup> This latter analysis controls for every recoded variable used by Professor Baldus in the CSS analyses, all of which are identified at DB 60.

murder was committed to avoid arrest -- (b)(10) -- and the defendant was a prisoner or an escapee -- (b)(9)). The race of defendant, though slightly less important, yet appears a more significant factor than whether the victim was a stranger or an acquaintance, whether the defendant was under 17 years of age, or whether the defendant had a history of alcohol or drug abuse. The comparable logistic regression measures reported in DB 82, while varying in detail, tell the same story: the race of the victim, and to a lesser extent the race of the defendant, play a role in capital sentencing decisions in Georgia more significant than many widely recognized legitimate factors. The race of the victim indeed plays a role as important as many of Georgia's ten statutory aggravating circumstances in determining which defendants will receive a death sentence.

with these important results at hand, Professor Baldus began a series of alternative analyses to determine whether the employment of other "models" or groupings of relevant factors might possibly diminish or eliminate the strong racial effects his data had revealed. Exhibit DB 83 reflects the results of these analyses. Whether Baldus employed his full file of recoded variables, a selection of 44 other variables most strongly associated with the likelihood of a death sentence, or selections of variables made according to other recognized

statistical techniques, both the magnitude and the statistical significance of the race of the victim factor remained remarkably stable and persistent. (The race of the defendant factor, as in earlier analyses, was more unstable; although strong in the least squares analyses, it virtually disappeared in the logistic analyses.)

Baldus next, in a series of analyses (see DB 85- DB 87) examined the race-of-victim and defendant effects within the subcategories of homicide accompanied by one of the two statutory aggravating factors, -- (b)(2), contemporaneous felony, or (b)(7), horrible or inhuman -- which are present in the vast majority of all homicides that received a death sentence (see DB 84). These analyses confirmed that within the subcategories of homicide most represented on Georgia's Death Row, the same racial influences persist, irrespective of the other factors controlled for simultaneously (see DB 85). Among the various subgroups of (b)(2) cases, subdivided further according to the kind of accompanying felony, the racial factors continue to play a role. (See DB 86; DB 87.)

Two of Professor Baldus' analyses involved the use of step-wise regressions, in which a model is constructed by mechanically selecting, in successive "steps," the single factor which has the most significant impact on the death-sentencing outcome, and then the most significant remaining factor with the first, most significant factor removed. Baldus performed this step-wise analysis using both least squares and logistic regressions. Baldus also performed a factor analysis, in which the information coded in his variables is recombined into different "mathematical factors" to reduce the possibility that multicolinearity among closely related variables may be distorting the true effect of the racial factors.

Professor Baldus then described yet another method of analysis of the racial factors — this method directly responsive to respondent's unsupported suggestion that the disproportionate death—sentencing rates among white victim cases can be explained by the fact that such cases are systematically more aggravated.

To examine this suggesstion, Baldus divided all of the CSS cases into eight, roughly equally—sized groups, based upon their overall levels of aggravation as measured by an aggravation—mitigation index. Baldus observed that in the less—aggravated categories, no race—of-victim or defendant disparities were found, since virtually no one received a death sentence. Among the three most aggravated groups of homicides, however, where a death sentence became a possibility, strong race—of-victim disparities, and weaker, but marginally significant race—of-defendant disparities, emerged.

(See DB 89.)

Baldus refined this analysis by dividing the 500 most aggravated cases into 8 subgroups according to his aggravation/ mitigation index. Among these 500 cases, the race-of-victim disparities were most dramatic in the mid-range of cases, those neither highly aggravated nor least aggravated where the latitude for the exercise of sentencing discretion was the greatest.

(See DB 90.) While death sentencing rates climbed overall as the cases became more aggravated, especially victims within the groups of the cases involving black defendants, such as petitioner McCleskey, the race-of-victim disparities in the mid-range

<sup>26/</sup> Baldus noted that a similar method of analysis was a prominent feature of the National Halothane Study.

reflected substantial race-of-victim disparities:

	White Vic. Black Vic.		
Category	White Vic.	Black Vic.	
3	(3/10)	(2/18)	
•	(3/13)	(0/15)	
5	.35 (9/26)	.17	
6	(3/8)	(1/20)	
7	.64 · (9/14)	(5/13)	

# (DB 90.)

Race of <u>defendant</u> disparities, at least in white victim cases, were also substantial, with black defendants involved in homicides of white victims substantially more likely than white defendants to receive a death sentence.

Category	Black Def.	White Def.
3	(3/10)	.03 (1/39)
4	(3/13)	(1/29)
5	.35	.20 (4/20)
6	.38 (3/8)	.16 (5/32)
7	.64 (9/14)	.39 (5/39)
(DB 91.)		
	- 33 -	

These results, Professor Baldus suggested, not only support the hypothesis that racial factors play a significant role in Georgia's capital sentencing system, but they conform to the "liberation hypothesis" set forth in Kalven & Zeisel's The American Jury. That hypothesis proposes that illegitimate sentencing considerations are most likely to come into play where the discretion afforded the decisionmaker is greatest, i.e., where the facts are neither so overwhelmingly strong nor so weak that the sentencing outcome is foreordained.

# 4. Racial Disparities at Different Procedural Stages Another central issue of Professor Baldus' analysis, one

made possible by the comprehensive data obtained in the CSS, was his effort to follow indicted murder cases through the charging and sentencing system, to determine at what procedural points the racial disparities manifested themselves. Baldus observed at the outset that, as expected, the proportion of white victim cases rose sharply as the cases advanced through the system, from 39 percent at indictment to 84 percent at death-sentencing, while the black defendant/white victim proportion rose even faster, from 9 percent to 39 percent. (See DB 93.) The two most significant points affecting these changes were the prosecutor's decision on whether or not to permit a plea to voluntary manslaughter, and the prosecutor's decision, among convicted cases, of who to take on to a sentencing trial. (See DB 94.)

<sup>27/</sup> H. KALVEN & H. ZEISEL, THE AMERICAN JURY 164-67 (1966).

The race-of-victim disparities for the prosecutor's decision on whether to seek a penalty trial are particularly striking, consistently substantial and very highly statistically significant in both the PRS and the CSS, irrespective of the number of variables or the model used to analyze the decision (see DB 95). The race-of-defendant disparities at this procedural stage were substantial in the CSS, though relatively minor and not statistically significant in the PRS. (Id.) Logistic regression analysis reflects a similar pattern of disparities in both the CSS and the PRS. (see DB 96.).

# 5. Analysis of Other Rival Hypotheses

Professor Baldus then reported seriatim on a number of different alternative hypotheses that might have been thought likely to reduce or eliminate Georgia's persistent racial disparities. All were analyzed; none had any significant effects. Baldus first hypothesized that appellate sentence review by the Georgia Supreme Court might eliminate the disparities. Yet while the coefficients were slightly reduced and the statistical significance measures dropped somewhat after appellate review, most models (apart from the stepwise regression models) continued to reflect real and significant race-of-victim disparities and somewhat less consistent, but observable race-of-defendant effects as well.

Baldus next hypothesized that the disparities do not reflect substantial changes or improvements that may have occurred in the Georgia system between 1974 and 1979. Yet when the cases were subdivided by two-year periods, although some minor fluctuations were observable, the disparities in the 1978-1979 period were almost identical to those in 1974-1975. (See. DB 103.) An urban-rural breakdown, undertaken to see whether different sentencing rates in different regions might produce a false impression of disparities despite evenhanded treatment within each region, produced instead evidence of racial disparities in both areas, (although stronger racial effects appeared to be present in rural areas (See DB 104.)) Finally, no discernable difference developed when sentencing decisions by juries alone were compared with decisions from by sentencing judges and juries. (See DB 105.)

# 6. Pulton County Data

Professor Baldus testified that, at the request of petitioner, he conducted a series of further analyses on data drawn
from Fulton County, where petitioner was convicted and sentenced.
The purpose of the analyses was to determine whether or not the
racial factors so clearly a part of the statewide capital
sentencing system played a part in sentencing patterns in Pulton
County as well., Since the smaller universe of Pulton County
cases placed some inherent limits upon the statistical operations
that could be conducted, Professor Baldus supplemented these
statistical analyses with two "qualitative" studies: (i) a "near

neighbors" analysis of the treatment of other cases at a level of aggravation similar to that of petitioner; and (recognizing that petitioner's victim has been a police officer) an analysis of the treatment of other police victim cases in Fulton County.

# Analysis of Statistical Disparities

Professor Baldus began his statistical analysis by observing the unadjusted disparities in treatment by victim/defendant-racial combinations at six meparate decision points in Pulton County's charging and sentencing system. The results show an overall pattern roughly similar to the statewide pattern:

Black Def.	White Def. White Vic.	Black Def.	White Def.
White Vic.		Black Vic.	Black Vic.
.06	.05	.005 (2/412)	(0/8)

(DB 106.) The unadjusted figures also suggest (i) a greater willingness by prosecutors to permit defendants to plead to voluntary manslaughter in black victim cases, (ii) a greater likelihood of receiving a conviction for murder in white victim cases, and (iii) a sharply higher death sentencing rate for white victim cases among cases advancing to a penalty phase. (DB 106; DB 107.) When Professor Baldus controlled for the presence or absence of each of Georgia's statutory aggravating circumstances separately, he found very clear patterns of race-of-victim disparities among those case categories in which death sentences, were most frequently imposed (DB 108). Among (b)(2) and (b)(8) cases -- two aggravating cirstances present in petitioner's own

case -- the race-of-victim disparities were .09 and .20 respectively (although the number of (b)(8) cases was too small to support a broad inference of discrimination).

when Professor Baldus controlled simultaneously for a host of variables, including 9 statutory aggravating circumstances, a large number of mitigating circumstances, and factors related to both the crime and the defendant (see DB 114 n.1 and DB 96A, Schedule 3), strong and highly statistically significant race-of-victim disparities were evident in both the decision of prosecutors to accept a plea (-.55, p=.0001) and the decision to advance a case to a penalty trial after conviction (.20, p=.01) (DB 114). Race-of-defendant disparities were also substantial and statistically significant at the plea stage (-.40, p=.01) and at the stage where the prosecutor must decide whether to advance a case to a penalty trial (.19, p=.02) (DB 114). These racial disparities in fact, were even stronger in Pulton County than they were statewide.

Although the <u>combined</u> affects of all decision-points in this analysis for Fulton County did not display significant racial effects, Professor Baldus suggested that this was likely explained by the very small number of death-sentenced cases in Fulton County, which made precise statistical judgments on overall impact more difficult.

# b. "Near Neighbors" Analysis

Aware of the limits that this small universe of cases would impose on a full statistical analysis of Fulton County data, Professor Baldus undertook a qualitative analysis of those cases in Fulton County with a similar level of aggravation to petitioner the "near neighbors." Baldus identified these neighboring cases by creating an index through a multiple regression analysis of those non-suspect factors most predictive of the likelihood of a death sentence statewide. Baldus then rank-ordered all Fulton County cases by means of this index, and identified the group of cases nearest to petitioner. He then broke these cases, 32 in all, into three subgroups -- more aggravated, typical, and less aggravated -- based upon a qualitative analysis of the case summaries in these 32 cases. Among these three subgroups, he calculated the death-sentencing rates by race-of-victim. As in the statewide patterns, no disparities existed in the less aggravated subcategory, since no death sentences were imposed there at all. In the "typical" and "more aggravated" subcategories, however, race-of-victim disparities of .40 and .42 respectively, appeared. (See DB 109; DB 110.) Professor Baldus testified that this near neighbors analysis strongly reinforced the evidence from the unadjusted figures that racial disparities, especially by race-of-victim, are at work not only statewide, but in Fulton County as well.

# c. Police Homicides

Professor Baldus' final Pulton County analysis looked at the disposition of 10 police-victim homicides, involving 18 defendants, in Pulton County since 1973. (See DB 115.) Among these 18 potential cases, petitioner alone received a death sentence. Professor Baldus divided 17 of the cases into two subgroups, one subgroup of ten designated as "less aggravated, " the other subgroup of seven designated as "aggravated." (See DB 116.) The "aggravated" cases were defined to include triggerpersons who had committed a serious contemporaneous offense during the homicide. Among the seven aggravated cases, three were permitted to plead guilty and two were convicted, but the prosecutor decided not to advance the cases to a penalty trial. Two additional cases involved convictions advanced to a penalty trial. In one of the two, petitioner's case, involving a white officer, a death sentence was imposed; in the other case, involving a black officer, a life sentence was imposed.

Although Professor Baldus was reluctant to draw any broad inference from this analysis of a handful of cases, he did note that this low death-sentencing rate for police-victim cases in Fulton County paralleled the statewide pattern. Moreover, the results of this analysis were clearly consistent with petitioner's overall hypothesis.

<sup>28/</sup> One defendant, treated as mentally deranged by the system, was not included in the analysis.

# 7. Professor Baldus' Conclusions

In response to questions posed by petitioner's counsel (see DB 12), Professor Baldus offered his expert opinion — in reliance upon his own extensive analyses of the PRS and CSS studies, as well as his extensive review of the data, research and conclusions of other researchers — that sentencing disparities do exist in the State of Georgia based upon the race of the victim, that these disparities persist even when Georgia statutory aggravating factors, non-statutory aggravating factors, mitigating factors, and measures of the strength of the evidence are simultaneously taken into account. Professor Baldus further testified that these race—of—victim factors are evident at crucial stages in the charging and sentencing process of Pulton County as well, and that he has concluded that these factors have a real and significant impact on the imposition of death sentences in Georgia.

Professor Baldus also addressed the significance of the race-of-defendant factor. While he testified that it was not nearly so strong and persistent as the race of the victim, he noted that it did display some marginal effects overall, and that the black defendant/white victim racial combination appeared to have some real impact on sentencing decisions as well.

# D. Dr. George Woodworth

# 1. Area of Expertise

Petitioner's second expert witness was Dr. George Woodworth, Associate Professor of Statistics and Director of the Statistical Consulting Center at the University of Iowa. Dr. Woodworth testified that he received graduate training as a theoretical statistician under a nationally recognized faculty at the University of Minnesota. (See GW 1.) One principal focus of his academic research during his graduate training and thereafter has been the analysis of "nonparametric" or discrete outcome data, such as that collected and analyzed in potitioner's case. After receiving his Ph.D. degree in statistics, Dr. Woodworth was offered an academic position in the Department of Statistics at Stanford University, where he first became professionally interested in applied statistical research. While at Stanford, Dr. Woodworth taught nonparametric statistical analysis, multivariate analysis and other related courses. He was also selected to conduct a comprehensive review of the statistical methodology employed in the National Halothane Study, for presentation to the National Research Council. Thereafter, upon accepting an invitation to come to the University of Iowa, Dr. Woodworth agreed to become the director of Iowa's Statistical Consulting Center, in which capacity he has reviewed and consulted as a statistician in ten to twenty empirical studies a year during the past eight years.

Dr. Woodworth has published in a number of premier refereed professional journals of statistics on nonparametric scaling tests and other questions related to his expertise in this case. He has also taught courses in "the theory of probability, statistical computation, applied statistics, and experimental design and methodology. In his research and consulting work, Dr. Woodworth has had extensive experience in the use of computers for computer-assisted statistical analysis.

After hearing his credentials, the Court qualified Dr. Woodworth as an expert in the theory and application of statistics and in statistical computation, especially of discrete outcome data such as that analyzed in the studies before the Court.

# 2. Responsibilities in the PRS

Dr. Woodworth testified that he worked closely with Professor Baldus in devising statistically valid and acceptable procedures for the selection of a universe of cases for inclusion in the PRS. Dr. Woodworth also reviewed the procedures governing the selection of cases to be included in the three subgroups on which data were collected at different times and with different instruments to ensure that acceptable principles of random case selection were employed.

Dr. Woodworth next oversaw the conversion of the data received from the PRS coders into a form suitable for statistical analysis, and he merged the several separate data sets into one

comprehensive file, carefully following established statistical and computer procedures. Dr. Woodworth also assisted in the cleaning of the PRS data, using computer techniques to uncover possible errors in the coding of the data.

# 3. CSS Sampling Plan

Dr. Woodworth's next principal responsibility was the design of the sampling plan for the CSS, including the development of appropriate weighting techniques for the stratified design. In designing the sample, Dr. Woodworth consulted with Dr. Leon Burmeister, a leading national specialist in sampling procedures. Dr. Burmeister approved the CSS design, which Dr. Woodworth found to have employed valid and statistically acceptable procedures throughout. Dr. Woodworth explained in detail how the sample was drawn, and how the weights for analysis of the CSS data were calculated, referring to the Appendices to GW 2 (see GW 2, pp. 5ff.)

# 4. Selection of Statistical Techniques

Dr. Woodworth testified that he employed accepted statistical and computer techniques in merging the various data files collected for the CSS, and in assisting in the data cleaning efforts which followed.

Dr. Woodworth also made the final decision on the appropriate statistical methods to be employed in the analysis of the CSS and PRS data. Be testified at length concerning the statistical assumptions involved in the use of weighted and unweighted least squares regressions, logistic regressions and index methods, and gave his professional opinion that each of those methods was properly employed in these analyses according to accepted statistical conventions. In particular, Dr. Woodworth observed that while certain assumptions of least squares analysis appeared inappropriate to the data in these studies -- especially the assumption that any racial effects would exercise a constant influence across the full range of cases -- the use of that method did not distort the effects reported in the analyses, and its use allowed consideration of helpful and unbiased information about the racial effects. Moreover, Dr. Woodworth noted that the alternative analyses which employed logistic regressions -- a form of regression analysis dependent upon assumptions closely conforming to the patterns of data observed in these studies -- also found the persistence of racial effects and showed that the use of least squares analysis could not account for the significant racial disparities observed.

# 5. Diagnostic Tests

Dr. Woodworth conducted a series of diagnostic tests to determine whether the methods that had been selected might have been inappropriate to the data. Table 1 of GW 4 reflects the results of those diagnostic tests, performed on five models that were used throughout the CSS analysis. Por both the race of the victim and race of the defendant, Dr. Woodworth compaged

coefficients under a weighted least squares regression analysis, an ordinary least squares regression analysis, a "worst case" approach (in which cases with "missing" values were systematically coded to legitimize the system and run counter to the hypotheses being tested), a weighted least squares analysis removing the most influential cases, a weighted least squares analysis accounting for possible "interactions" among variables, a weighted logistic regression analysis, and an unweighted logistic regression analysis. (GW-4, at Table 1.) Dr. Woodworth also employed a conservative technique to calculate the statistical significance of his results (see GW 3, at 6 n.1, and Schedule II, for a calculation of Cressie's safe method) and a "modified Mantel-Haenzel Procedure (see GW 3, Schedules 1 and 3) to test the logistic regressions. These various diagnostic tests did not eliminate, and in most cases did not even substantially diminish, the race-of-victim effects. The levels of statistical significance remained strong, in most instances between two and three standard deviations, even employing Cressie's conservative "safe" method to calculate significance.

Dr. Woodworth testified that, after this extensive diagnostic evalution, he was confident that the statistical procedures selected and employed in the PRS and CSS analyses were valid, and that the racial disparities found by the two studies were not produced by the use of inappropriate statistical methods or by incorrect specification of the statistical model.

# 6. Models of the Observed Racial Disparities

Dr. Woodworth then directed the Court's attention to two figures he had developed to summarize the overall racial disparities in death-sentencing rates identified by the CSS study, employing the "mid-range" model in which both Dr. Woodworth and Professor Baldus had expressed particular confidence. (See GW 5A and 5B.) As Dr. Woodworth explained, these figures represented the likelihood of receiving a death sentence at different levels of aggravation. Among black defendants such as petitioner (see GW 5B, Fig. 2), Dr. Woodworth noted that the death-sentencing rate in Georgia rises far more precipitously for white victim cases as aggravation levels increase than does the rate for black victim cases. For example, Dr. Woodworth observed, at the .4 level of aggravation, those black defendants who had killed white victims were exposed to a .15 point higher likelihood of receiving a death sentence. A similar disparity, based upon race of the victim, obtained among white defendants. (See GW SA, Pig. 1.)

Prom these figures, Dr. Woodworth concluded that although white victim cases as a group are more aggravated than black victim cases, strong racial disparities exist in Georgia even when only those cases at similar levels of aggravation are compared.

# E. Lewis Slayton Deposition

Petitioner offered, and the Court admitted pursuant to Rule 7 of the Rules Governing Section 2254 Cases, a transcript of the deposition of Lewis Slayton, the District Attorney for the Atlanta Judicial Circuit. In his deposition, while District Attorney Slayton stated several times that race did not play a role in sentencing decisions (Dep., at 78), he acknowledged that his office had no express written or unwritten policies or quidelines to govern the disposition of homicide cases at the indictment stage (Dep., 10-12), the plea stage, (Dep., at 26) or the penalty stage (Dep., 31, 41, 58-59). Moreover, murder cases in his office are assigned at different stages to one of a dozen or more assistant district attorneys (Dep., 15, 45-48), and there is no one person who invariably reviews all decisions on homicide dispositions (Dep., 12-14, 20-22, 28, 34-38). Slayton also agreed that his office does not always seek a sentencing trial in a capital case, even when statutory aggravating circumstances are present (Dep., 38-39). Slayton testified further that the decisionmaking process in his office for seeking a death sentence is "probably ... the same" as it was in the pre-Furman period (Dep., 59-61), and that the jury's likely verdict influences whether or not a case will move from conviction to a penalty trial (Dep. 51, 38-39).

#### F. Other Evidence

Petitioner offered the testimony of L. G. Warr, a parole officer employed by the Georgia Board of Pardons and Paroles.

officer Warr ac rowledged that in preparing the Parole Board reports used by Professor Baldus in his study, parole investigators were obligated by statute and by the Board Manual of Procedure in all murder cases to speak with the prosecuting attorney and police officers if possible, soliciting records, witness interviews and other sources of information, including comments from the prosecutor not reflected in any written document or file. The Manual instructs investigators that it is imperative in cases involving personal violence to obtain information on all aggravating and mitigating circumstances. The portions of the Manual admitted as LW 1 confirm Officer Warr's testimony.

Petitioner also introduced testimony from petitioner's sister, Betty Myer, that petitioner's trial jury included eleven whites and one black.

Finally, petitioner proffered a written report by Samuel Gross and Robert Mauro on charging and sentencing patterns in Georgia which was refused by the Court in the absence of live testimony from either of the report's authors.

# II. Respondent's Case

Respondent offered the testimony of two expert witnesses, Dr. Joseph Katz and Dr. Roger Burford.

# A. Dr. Joseph Katz

# 1. Areas of Expertise

Dr. Katz testified that he had received bachelors degrees

in mathematics and computer science from Louisiana State University. Katz received a Master degree in Mathematics and a Ph.D. degree in Quantitative Methods from L.S.U. A major focus of his professional research has been on input-output multiplier models used in the projection of economic developments by experts interested in regional growth. Dr Katz has taught various courses in basic statistics, operations research and linear programming in the Department of Quantitative Methods at L.S.U., in the Department of Management Information Sciences at the University of Arizona, and in the Department of Quantitative Methods at Georgia State University, where he is currently an Assistant Professor. Dr. Katz has published a number of articles on input-output multipliers in several refereed journals of regional science.

Respondent offered Dr. Katz as an expert on statistics, statistical analysis, quantitative methods, analysis of data, and research design. On voir dire, Dr. Katz acknowledged that he had no expertise at all in criminal justice or in the application of statistics to criminal justice issues. Dr. Katz was unfamiliar with any literature or research in the area. (Counsel for the State expressly conceded that the State was not offering Dr. Katz to shed light in the criminal justice area.)

Moreover, Dr. Katz has only one prior academic or professional experience in the design of empirical research or the collection of empirical data -- and that one experience involved the gathering of Census data from library sources. He acknowledged having taken no academic course in multivariate analysis.

Upon completion of voir dire, the Court agreed to accept Dr. Katz as an expert in statistics. The Court declined to qualify him as an expert in criminal justice, research design, or empirical research.

# 2. Critiques of Petitioner's Studies

# a. Use of Poil Method

Over petitioner's objection predicated on his lack of expertise, Dr. Ratz was permitted to testify that the use of the foil method of data entry for some of the PRS variables might have resulted in the loss of some information in those instances in which there were insufficient foils. The foil method also prevented a coder from reflecting completely certain data because of the arrangement of several of the foils.

Dr. Katz admitted that the CSS questionnaire, which largely avoided any foil entries, was an improvement over the PRS questionnaires, although Dr. Katz faulted the one or two items in the CSS which reverted to a foil approach.

#### b. Inconsistencies in the Data

Dr. Katz testified that he had run cross-checks of variables present in cases included in both the PRS and the CSS that appeared to be identical. These checks uncovered what seemed to Dr. Katz to be a number of "mismatches," suggesting that data may have been entered erroneously in one study, or the other, or both.

# c. Treatment of Unknowns

Dr. Katz presented several tables showing what he described

as "missing values." In his judgment, deletion of all cases with such missing values was necessary, thereby rendering any regression analysis virtually impossible.

### 3. Dr. Ratz' Conclusion

Dr. Ratz hypothesized that the apparent racial disparities reflected in the PRS and CSS research might be explained if it were shown that white victim cases generally were more aggravated than black victim cases. Dr. Ratz introduced a number of tables to establish that, as a whole, white victim cases in Georgia are more aggravated than black victim cases. Dr. Ratz admitted, however, that he had performed no analysis of similarly-situated black and white victim cases, controlling for the level of aggravation, nor had he performed any other analyses controlling for any variables that eliminated, or even diminished, the racial effects reported by Baldus and Woodworth.

#### B. Dr. Roger Burford

#### 1. Area of Expertise

Dr. Burford testified that he was a Professor of Quantitative Methods at Louisiana State University. He was also vice-president of a private research and consulting firm that conducts economic, market and public opinion research requiring extensive use of empirical methods. In his capacity as a consultant, Dr. Burford has testified as an expert witness between 100 and 150 times.

Dr. Burford has taught courses in sampling theory, research methods, multivariate analysis, computer simulation

modelling, and linear programming. He has published three textbooks on statistics and a wide range of articles on regional economic growth, computer simulation methods, and other topics.

petitioner stipulated to Dr. Burford's expertise in the area of statistical analysis. On voir dire, Dr. Burford admitted that apart from his participation in the statistical analysis of one jury pool, he has had virtually no professional exposure to the criminal justice system and was not qualified as an expert in this area.

# 2. Pitfalls in the Use of Statistical Analysis

Dr. Burford testified that his involvement in the review of the PRS and CSS studies was largely as a consultant to Dr. Katz. Dr. Burford conducted almost no independent analysis of these studies, but rather reviewed materials generated by Dr. Katz. Dr. Burford believed that Dr. Katz' approach to the PRS and CSS studies was reasonable, and testified that it "could be useful" in evaluating these studies.

The remainder of Dr. Burford's testimony focused upon the general limitations of statistical analysis. He suggested that statistics can provide evidence, but cannot constitute "proof in a strict sense." Dr. Burford warned that regression analysis can be misused, especially if the underlying data are invalid. Data sets rarely meet all of the assumptions ideally required for the use of regression analysis. Possible multicolinearity, he warned, could confound regression results, although use of factor analysis admittedly reduces

the problems of multicolinearity. Dr. Burford also cautioned that step-wise regressions can result in an overfitted model and can thus be misleading.

### 3. Dr. Burford's Conclusions

Dr. Burford did not offer any ultimate conclusions on the validity of the statistical methods used in the PRS and CSS studies. Be did acknowledge on cross-examination that the regressions run by Baldus and Woodworth were "pretty conclusive."

### III. Petitioner's Rebuttal Case

### A. Professor Baldus

On rebuttal, Professor Baldus disposed of several issues raised by respondent. He first addressed the questions raised by Dr. Katz concerning certain of his coding conventions, especially the failure to distinguish in his machine analysis between items coded 1 ("expressly stated in the file") and items coded 2 ("suggested by the file") on the questionnaires. Baldus testified that to examine the effect of this challenged practice, he had completed additional analyses in which, for 26 aggravating and mitigating variables, he recoded to make distinctions between items coded 1 and 2, rather than collapsing the two categories into one. He found that the distinctions had no effect on the racial coefficients, and only marginally affected the level of statistical significance.

Turning to a criticism that, in multiple victim cases, information had not been coded concerning the characteristics of the second and successive victims, Professor Baldus again

consider the problem. For the eight principal victim variable on which the questionnaires or case summaries contained sufficinformation, he recoded the computer for each of the 50-60 multiple victim cases, and them reran his analyses. The race-of-victim effects dropped by one-half of one percent, Baldus reported, and the race-of-defendant effects remained unchanged.

Baldus next discussed Dr. Eatz' table identifying "miss: values." He explained that, in his 230+ variable models, the table would reflect approximately 30 missing values per 230-variable case. Baldus noted that much of the data that trul was missing was absent, not from Baldus' own data-gathering effort, but from the magnetic tape provided by the Departmen of Offender Rehabilitation. Moreover, most of such missing related to chart teristics of the defendants which had not bused in Professor Baldus' analyses in any event. Other data "missing" from one variable was in fact suppied by data pres somewhere else in the questionnaire in another variable.

More centrally, Professor Baldus testifed that his entiphilosphy in the coding of unknown values, fully consistent with most of the relevant professional literature, was to assume that wherever an item was coded "unknown" or missing because of an absence of information in the files, the decis maker, prosecutor or jury, necessarily had been forced to to that factor as nonexistent. The basis for that assumption, explained, is that rational judgments normally are made upon

what is known; information not available cannot normally affect a decision. Moreover, Baldus testified that he knew of nothing to suggest any systematic bias created by missing values or unknowns that might possibly affect the racial disparities observed.

As a further safeguard on this point, however, Baldus testified about a table reporting regression results, controlling for the racial factors as well as nine statutory aggravating circumstances and prior record, in which he had deleted all cases with missing values, a method recommended by Dr. Katz. (See DB 120). The only effect of the deletions was to increase the race-of-victim coefficient by .02. The race-of-defendant coefficient remained the same, although somewhat less statistically significant (compare DB 78 with DB 120). A similar result occurred after reanalysis of the table reported in DB 121.

Baldus conducted yet another alternative analysis in which he assumed that every missing value would, if identified, run counter to his hypothesis, diminishing the racial effects.

Recalculating his DB 78 under those extreme "worst case" assumptions, Baldus found that the race-of-victim coefficient did drop from .07 to .05, but it remained highly statistically significant at the 1-in-100 level. (See DB 122). The race-of-defendent coefficient dropped from .04 to .03, and remained non-egrificant. (See also DB 123).

counter Dr. Katz' further suggestion that the lack of information on the race of the victim in a small number of cases might be important, Professor Baldus recoded those cases,

assigning black victim variables in death cases and white victim variables in life cases. Once again, the result of this "worst case" analysis revealed persistent race-of-victim effects, with a very high degree of statistical significance. (See DB 124).

Finally, in addressing Dr. Katz' "mismatch" tables
for the PRS and CSS files, Professor Baldus observed that some
of the "mismatches" simply reflected Dr. Katz' misunderstanding
of differences in variable definition between the two files.
Other "mismatches" occurred because Dr. Katz identified as
errors certain discrepancies between the cases of co-defendants,
unmindful that cases of co-defendants often reflect different or
inconsistent factual versions of a single crime. In those
mismatches where genuine discrepancies existed, Baldus noted, an
analysis of the case summaries revealed that the error rate was
higher in the PRS and lower in the CSS (on which most of the
analyses relied.) Finally, Baldus noted that Dr. Katz had made
no assertion that any systematic bias had been introduced by these
few random errors.

#### B. Dr. Woodworth

### 1. Statistical Issues

Dr. Woodworth on rebuttal spoke to several additional minor points raised by the State. He first addressed the observation of Dr. Katz that an estimated eleven cases existed in the CSS in which penalty trials had occurred but had not been identified by Baldus' coders. Katz speculated that these eleven omissions might have adversely affected the weighting

scheme for the CSS sample. Dr. Woodworth acknowledged that eleven missing penalty trial cases would have affected the weighting scheme; however, he calculated the degree of likely impact as affecting the third decimal place of the racial coefficients (e.g., .071 vs. .074.)

Dr. Woodworth confirmed Professor Baldus' testimony that, from a statistical standpoint, the few inevitable, but insignificant errors that may have been identified by Dr. Katz' crossmatching procedures could only have affected the racial coefficient if they had been systematic, rather than random, errors.

Dr. Woodworth next addressed an implication by Dr. Katz that since the level of statistical significance of the CSS racial disparities had dropped upon the introduction of additional variables to the model, the introduction of still further variables would eliminate statistical significance entirely. Through the use of a simple figure (see GW 6), Dr. Woodworth demonstrated the fallacy in Dr. Katz' reasoning, explaining that there was no statistically valid way to predict the effect of the addition of additional variables to a model.

### 2. Warren McClesky's Level of Aggragation

Finally, in response to a a question posed to him by the Court on petitioner's case-in-chief, Dr. Woodworth reported that, on the aggravation scale reported at GW 5A and 5B, Warren McClesky's case fell at the .52 level (see GW8). At that level, Dr. Woodworth explained, the disparities in black defendant cases dependent upon whether the victim was white or black was approximately 22 points.

Dr. Woodworth testified that, to arrive at the best overall figure measuring the likely impact of Georgia's racial disparities on a case at petitioner's level of aggravation, he had employed a triangulation approach, using three separate measures. Prom GW8, he drew a measure of 22 points; from DB 90, at level 5 where petitioner's case is located, the disparity was 18 points; from Dr. Woodworth's recalculation of logistic probabilities, the disparity in the midrange model was 23 points. Dr. Woodworth noted this "almost complete convergence" suggested a measure of the racial impact in a case at petitioner's level of over 20+ percentage points.

## C. Dr. Richard Berk

### 1. Areas of Expertise

Petitioner's final rebuttal witness was Dr. Richard Berk, Professor of Sociology at the University of California at Santa Barbara. Dr. Berk has an undergraduate degree from Yale and a Ph.D from John Hopkins University. (See RB 1.) Dr. Berk has taught courses in econometrics, statistics, and research design, and has published extensively in the areas of criminal justice statistics and sentencing issues. Dr. Berk has served as a consultant to the National Institute of Justice, to the

<sup>29/</sup> Both Baldus and Woodworth, as well as Dr. Burford testified that this or a similar model, which did not contain the hundreds of variables that might raise problems of multicolinearity, was probably the best model for measuring possible racial effects.

California Attorney General's Committee on Statistics, and to the counties of Baltimore and Santa Barbara, for which he has designed jury selection systems. Dr. Katz has also served on a select panel of the National Academy of Science which, during the past two years, has examined virtually every major empirical sentencing study ever conducted and formulated criteria for the conduct of such research. After hearing his testimony, the Court accepted Dr. Berk as an expert in statistics and in sociology.

# 2. Quality of Petitioner's Studies

Dr. Berk testified that he had received a copy of the magnetic tape containing the PRS and CSS studies some ten months prior to his testimony. During the intervening period, he had conducted some preliminary analyses on the data and had reviewed the Baldus and Woodworth preliminary report, as well as Dr. Katz' written evaluation of that report. Dr. Berk found both the PRS and CSS to be studies of "high credibility." Be testified that among the hundreds of sentencing research efforts he had reviewed for the National Academy of Sciences, the Baldus and Woodworth studies were "far and away the most complete," that they employed "state of the art diagnostics," that the data quality was "very salient" — in sum that he knew of no better published studies anywhere on any sentencing issue. Dr. Berk also commented favorably on such features of the studies as the

<sup>30/</sup> The report of the Special Committee has been published as RESEARCH ON SENTENCING: THE SEARCH FOR REFORM (1983).

comprehensive use of alternative statistical analyses, the computer system employed, and Baldus' assumptions about the proper treatment of "unknowns" or "missing values." Moreover, Dr. Berk testified that after reading the Katz report and hearing the testimony of Dr. Katz and Dr. Burford, he came away even more persuaded by the strength and reliability of petitioner's studies.

# 3. The Objections of Dr. Ratz and Dr. Burford

Dr. Berk testified that he concurred with Dr. Burford's testimony listing possible pitfalls in the use of statistical analysis; however, Berk saw no evidence that the Baldus and Woodworth studies had fallen victim to any of these errors, and he did not understand Dr. Burford to have identified any serious weaknesses in either of the studies.

Turning to Dr. Katz' testimony, Dr. Berk first addressed the possible effects of multicolinearity on the racial disparities observed by Baldus. He noted that the diagnostics that had been performed by Dr. Woodworth failed to reveal serious multicolinearity in the studies, but that such effects, even if serious, could have only dampened or diminished the racial effects.

Dr. Berk faulted the logic of Dr. Katz' suggestion that the more aggravated general level of white victim cases was a plausible hypothesis to explain the racial disparities observed. He noted that the important question was how white and black victim cases were treated at similar levels of aggravation; while

Dr. Ratz had not even attempted to address this latter question, petitioner's experts had done so, and he found convincing Dr. Woodworth's proof that at similar levels of aggravation, marked differences were clear in the treatment of cases by race of the victim.

Addressing Professor Baldus' coding of "unknowns," Dr. Berk observed that the National Academy of Sciences committee had discussed this very question, concluding as did Professor Baldus that the proper course was to treat unknown data as having no influence on the decisionmaker. Berk further observed, respecting the "missing data" problem, that missing data levels no greater than 10 to 15 percent of the total (the PRS and CSS figures were 6 percent or less) "almost never makes a difference" in the outcome of statistical analysis. Moreover, were such missing data having a serious effect on the studies, a predictable symptom would be a skewing or inverting of other anticipated effects, such as those of powerful determinants of sentence such as the statutory aggravating circumstances. In Baldus' studies, however, no such symptons appeared, leading Dr. Berk to discount missing data as a serious problem.

## D. The Lawyer's Model

-

Several weeks after the August, 1983 evidentiary hearing, Professor Baldus submitted an affidavit describing in detail the results of an analysis employing a model developed by the Court, including factors selected as likely to predict whether a homicide case would receive a capital sentence. The race-ofvictim disparities reported by Professor Baldus upon completion of extensive analyses using the Lawyer's Model were fully consistent with the results presented during the evidentiary hearing:

"There are persistent race of victim effects and when the analysis focuses on the more aggravated cases, where there is a substantial risk of a death sentence, those effects increase substantially.

Baldus Aff., at 10. See id., at 19.

OR THE DEVENT CHARTE

WARREN HECT, ESTEY

DEPT. FROM THE UNITED SPACES INSERTED COMMENTS OF GEORGIA

MANC BUT FOR PETITIONER SCLESSES

ISIS Healey Building
Atlanta, Georgia 3030

JACK GREENBERG

JAMES N. NABRIT, HIT

JOHN CHARLES BOGER

99 Audson Street

40 New York, New York 1001

FINCTEY K. FORD
600.Pioneer Square
Seattle, Washington 94305

ANTHONY G. AMSTERDAM
New York University Law School
Of Washington Square South
New York, New York 1012

ATTORNEYS FOR PETITIONER-APPELLED

Nevertheless, we submit that the statistical case alone is sufficient to warrant relief. This Court has recognized that "[i]n some instances, circumstantial or statistical evidence of racially disproportionate impact may be so strong that the results permit no other inference but that they are the product of a racially discriminatory intent or purpose. \* Smith v. Balkcom, 671 F.2d 858, 859 (5th Cir. Unit B 1982)(on rehearing); cf. Adams v. Wainwright, 709 F.2d 1443, 1449 (11th Cir. 1983). Petitioner's comprehensive statistical evidence on the operation of Georgia's capital statutes from their inception in 1973 through 1979, demonstrating substantial, pervasive disparities pased upon the race of the homicide victim and the pace of the defendant, constitutes just the sort of "clear pattern, unexplainable on grounds other than race," Arlington Heights V. Metropolitan Bousing Authority, 429 C.S. 252 266 (1977), that the Supreme Court has held to establish an Equal Protection violation. It is to petitioner's evidence that we now turn.

- B. The Facts: Petitioner Has Made Out A Compelling Prima Facie Case Of Racial Discrimination In Capital Sentencing
  - (i) <u>Petitioner's Experts Were Well Qualified</u>

    The statistical case-in-chief for petitioner was pre-

1

<sup>17/ (</sup>continued)

Washington V. Davis, 426 U.S. 229, 265-66 (1976). Having denied petitioner access to the records from which such discriminatory acts might have been proven, moreover, (R. 596; see Fed. Hab. Tr. 1797-99), the District Court should not have faulted petitioner for failure to introduce such non-statistical evidence as part of its case-in-chief. (See R. 1141). If this Court's review of petitioner's substantial statistical evidence leaves the Court with any doubts about petitioner's prima facie claim, it should remand the case to the District Court for the receipt of this significant nonstatistical evidence.

sented through the testimony of two experts eminently qualified to investigate the very matters at issue. Professor David Baldus, petitioner's chief researcher, testified concerning his background and training in law as well as his extensive experience in the development and use of social science methods to examine legal issues. Educated in political science at Pittsburgh and in law at Columbia and Yale Law Schools (Fed. Hab. Tr. 39-42), Baldus has pursued a distinguished research and teaching career, focused upon the applications of social science methods to legal issues. His first major research effort, on the impact of certain social welfare laws, has subsequently "been reprinted in a number of books, and it's used in courses in sociology departments and in law schools to illustrate [time series] ... methodology as a way of trying to determine the impact the enactment of laws ha[s]." (Id. 52-53).18/

As a result of consultations on that first project with Professor James Cole, a statistician, Baldus began an extended research collaboration with Cole on how courts should employ statistical evidence in evaluation of claims of discrimination. (Id. 54-55). The ultimate fruit of that effort is an authoritative text in the field, D. BALDUS & J. COLE, STATISTICAL PROOF OF DISCRIMINATION (1980) (id. 68), widely relied upon by the federal courts in evaluating the quality of statistical evidence. (Fed. Bab. Tr. 74-75; see DB6).

As part of his research for that work, Baldus happened to

<sup>18/</sup> Baldus, "Welfare as a Loan: An Empirical Study of the Recovery of Public Assistance Payments in the United States," 25 STAN. L. REV. 123 (1973).

obtain and reanalyze an extensive data set on capital punishment patterns collected in the mid-1960's by Professor Marvin Wolfgang. 19.

Subsequently, Baldus also obtained and reviewed a second major data set on capital punishment patterns collected at Stanford University during the late 1950's and early 1960's. (Id.).20/

Baldus further pursued his interest in capital punishment in a critical evaluation of the methodologies employed in two key studies on the deterrent value of capital punishment, published in a special 1975 symposium on the death penalty in the Yale Law Journal.21/

After <u>Greeg</u> v. <u>Georgia</u> in 1976, Professor Baldus' research interest in capital punishment intensified into a principal focus of his work. During the succeeding seven years, Baldus devoted a major portion of his research (<u>id</u>. 84-100), writing (<u>id</u>. 85-90)<u>22</u>/, and teaching energies (<u>id</u>. 90) to the post-<u>Greeg</u> capital punishment statutes and their administration, reviewing every Supreme Court case on capital sentencing and studying the professional

<sup>19/</sup> See Wolfgang & Riedel, "Race, Judicial Discretion and the Death Penalty, 407 ANNALS 119 (1973).

<sup>20/</sup> See Special Edition, "A Study of the California Penalty Jury in First Degree Murder Cases," 21 STAN. L. REV. 1297 (1969).

<sup>21/</sup> Baldus & Cole, "A Comparison of the Work of Thorsten Sellin and Isaac Ehrlich on the Deterrent Effect of Capital Punishment," 85 YALE L. J. 170 (1975).

<sup>22/</sup> See DB 1 at 2; e.g., Baldus, Pulaski, Woodworth & Kyle, Tidentifying Comparatively Excessive Sentences of Death, 33 STAN. L. REV. 601 (1977); Baldus, Pulaski & Woodworth, "Proportionality Review of Death Sentences: An Empirical Study of the Georgia Experience," J. CRIM. LAW & CRIMINOLOGY (forthcoming 1983).

literature on sentencing patterns in both capital and non-capital cases ( $\underline{id}$ . 130-31;  $\underline{see}$  DB 13) as part of his preparation for the two studies that formed the basis of petitioner's statistical case  $\underline{below}$ . 23/

Petitioner's other expert on his case-in-chief was Dr. George Woodworth, an Associate Professor of Statistics at the Univeristy of Iowa. Dr. Woodworth testified that he had been trained as a theoretical statistician (id. 1195), specializing in nonparametric analysis of categorical data (the very sort of data at issue in 'petitioner's two studies). (Id. 1197, 1200). While teaching at Stanford University, Dr. Woodworth develoyed an interest in applied statistics (id. 1200), and was invited by the National Research Council and its chief statistician, Frederick Mosteller, to conduct a formal review of the statistical methodology used in a major national research project (id. 1200-01) (which employed many of the methods Baldus and Woodworth ultimately incorporated into their own studies). (Id. 154-58). Dr. Woodworth also served as the Director of Iowa's Statistical Consulting Center, advising researchers on appropriate statistical techniques for over eighty empirical studies. (Id. 1203-04). Se has published widely in statistical journals (see GW 1, at 2-3), and is a member of the Committee on Law and Justice Statistics of the American Statistical Association. (Id. 1194).24/

<sup>23/</sup> Baldus also served as a consultant on capital sentencing review to two state supreme courts (id. 94-96) and was at the time of the 1983 hearing a principal consultant to a Task Force of the National Center for State Courts, charged with developing appellate capital sentencing methods and standards. (Id. 97-133). In light of his extensive experience, the District Court's finding that '[D]efore he became involved in projects akin to that under analyses here, Baldus apparently had had little contact with the criminal justice system, 'is clearly erroneous.

<sup>24/</sup> The District Court qualified Professor Woodworth in the "theory and application of statistics, and in the statistical ... analysis of discre(te) outcome data," (id. 1206).

## (ii) Petitioner's Data-Gathering Effort Was Carefully Conducted

Petitioner's experts testified that they undertook two overlapping studies of the administration of Georgia's capital sentencing system in the post-Furman era. The first of these, entitled the Procedural Reform Study ("PRS"), was designed to examine whether disparities in treatment, based upon race, could be found at two key "decision points" in the Georgia system: the prosecutor's decision, following a murder conviction, on whether to proceed to a penalty trial, where a death sentence might be imposed, or to accept the automatic life sentence that follows any murder conviction under Georgia law; and the jury's decision, in those cases advancing to a penalty trial, on life imprisonment or death. (Id. 166-67).25/ The universe for the PRS was defined to include all defendants arrested between the enactment of Georgia's post-Furman capital statute on March 28, 1973 and June 30, 1978, who were subsequently convicted of murder some 594 individuals. (Id. 170-71; 192).

The second study, designated the Charging and Sentencing Study (\*CSS\*), was designed to examine possible racial discrimination at all decision points from indictment forward, including prosecutorial plea bargaining decisions, jury decisions on conviction or acquittal, and the sentencing decisions encompassed in the PRS. (Id. 261). The CSS was framed to include a sample of persons indicted for both murder and for voluntary manslaughter

<sup>25/</sup> For a description of the statutory options available under Georgia law upon conviction for murder, see Greco 7. Georgia, supra, 428 C.S. at 162-66.

during the entire period from 1973 through 1978. (Id. 263-64).26/

The data-gathering procedures have been summarized elsewhere.

(See Spencer 1st Br., App. A 11-13, 17-23). We will here confine our attention to four aspects of that process: (a) the integrity of the data sources; (b) the strengths of the data-gathering instruments employed; (c) the care and accuracy of the coding process; and the (d) coding conventions employed.

## (a) The Integrity of the Data Sources

Professor Baldus testified that, in choosing a state for study, he and his colleagues "were very much concerned about the availability of data." (Id. 160). Baldus dispatched a colleague "to Georgia for a period of two weeks to find out what data were here that we could get access to, and he returned to Iowa with a glowing report about the many sources of data." (Id. 174-75). These included not only the records of the Supreme Court of Georgia -- which typically contained trial transcripts, trial judges' reports, appellate briefs, and a summary card on each case (id. 175; 202-04; see, e.g., DB 29-33) -- but also background information on each defendant in the files of the Department of Offender Rehabilitation (id. 175; 204-05) and victim information from the Bureau of Vital Statistics (id. 176; 205-06; see, e.g., DB 47).

<sup>26/</sup> The PRS does not involve a sample; instead it includes every individual within the universe. The CSS, by contrast, embraces a universe of 2464 from which a weighted sample of 1066 cases was drawn by scientifically appropriate procedures, (1d. 265-73).

Most importantly, Baldus and his colleagues eventually located "an extensive file of information on all offenders" in the Board of Pardons and Paroles (<u>id</u>. 176), which became the basic source for the Charging and Sentencing Study.

The official Pardons and Parole files, petitioner demonstrated to the District Court, are kept pursuant to a stringent state statute that requires the Board "to obtain and place in its permanent records as complete information as may be practically available on every person who may become subject to any relief which may be within the power of the Board to grant ... [including] A. A complete statement of the crime for which such person is sentenced, [and] the circumstances of such crime ... E. Copy of pre-sentence investigation and previous court record ... [and] E. Any social, physical, mental or criminal records of such person.\* (Former GA. CODE. ANN. 5 77-512). L.W. Warr, a former field officer for the Board, now a field supervisor (Fed. Eab. Tr. 1827), testified that field officers (all of whom are required to be college graduates) (id. 1329), are trained to "check local criminal records ... go to the clerk of court, get sentence information, indictments, jail time affidavits, we get police reports from the agency that handled the case.\* (Id. 1330-31).27/

The District Court noted that "the police reports were missing in 75% of the cases [and] the coders treated the Parole Board summary as a police report" (R. 1161; see 1157). Officer Warr testified, however, that whenever the actual police reports were not included in Parole Board files, they were always summarized, and nothing "contained in the police reports ... would [be] routinely omit[ted]" (Fed. Hab. Tr. 1332; accord, id. 1331). Furthermore, Warr stated that, especially in homicide cases, field officers often went beyond the report to "interview the [police] officers that were involved in the case" (id. 1332). For this reason, the Pardon Board summaries were typically superior sources of information to the actual police reports themselves.

In homicide cases, moreover, Parole Board officers routinely speak, not only with the investigating police officers (14.1332), but also with the District Attorney to obtain "his comments concerning the case" and "his impression regarding what happened ... involving the particular crime." (14.1333). The officers were guided in their investigation by a Field Operations Manual (LW 1), which contained the following instructions,

\*3.02 ... The importance of this report cannot be over-emphasized; and where the offender has been convicted of crimes against the person, it is imperative that the Officer extract the exact circumstances surrounding the offense. Any aggravating or mitigating circumstances must be included in the report.

"3.02 ... Circumstances of the offense This should be obtained in narrative form, it
should be taken from the indictment, the
District Attorney's Office, the arresting
officers, witnesses, and victim. A word
picture, telling what nappened, when, where,
how and to whom should be prepared."

The Parole Officer should be as thorough as possible when conducting post-sentences on persons who have received ... sentences in excess of fifteen years. In cases where arrest reports are incomplete the circumstances of the offenses should be obtained as thoroughly as possible and the Parole Officer should review the transcript of the final if available for detailed information. A personal interview with the arresting or investigating officer is almost always a valuable source of information as the officer may recall important details and facts which were not revealed in the arrest report.

(1d., 2-4). The State offered no testimony to suggest that these standards were not regularly followed, or that the official

Parole Board record contained any systematic errors or omissions (id. 648: "we're not in a position at this point to challenge the underlying data source ... from the Pardons and Paroles Board") -- much less any information that these files were systematically biased according to the race of the defendant or the victim. 28/

Baldus acknowledged that some data were occasionally missing from the Pardons and Paroles files, as well as from the files of other agencies -- the Georgia Supreme Court, the Department of Offender Rehabilitation, and the Bureau of Vital Statistics -- to which he also turned. (Id. 205-06). The only important categories of missing data, however, involved information on the race of the victim, on whether a penalty trial had occurred, and on whether a plea bargain had been offered. (Id. 586-88).29/ Baldus took extraordinary steps to obtain this information from official files, even writing systematically to defense counsel and prosecutors to secure it where official sources failed. (Id. 587-88; see DB 45, 46). Moreover, petitioner sought without success to secure

<sup>28/</sup> In light of this uncontradicted testimony, the District Court's findings that "(t)he information available to the coders from the Parole Board Files was very summary," (R. 1160), and that "(t)he Parole Board summaries themselves were brief" or "incomplet(e)" (1d.), are at least misleading, if not clearly erroneous.

Despite extensive testimony explaining the rationale under which the coders were instructed to code certain information as "U" or "unknown" in Baldus' questionnaires (see id. 444-45, 524-27, 1664-90), and further testimony on the scientific appropriateness of Baldus' use of the "U" code (id. 1761-64), the District Court suggests throughout its opinion that this accepted coding convention represents "missing data" (R. 1163-67). We deal with the "U" coding issue and its actual effect on Baldus' analyses at pages 41-44.

these data from respondent during the discovery process. (R. 556; 595-96; 599; 615).

In the end, the amount of missing data proved scientifically insignificant. Only 5 of the 594 cases in the PRS lacked raceof-victim information (id. 1096; 1705-06); for the CSS, the number was 63 of 1066 (id.). Penalty trial information was missing in only 23 of the 594 for the PRS (id. 1104), in an estimated 20 to 30 of 1066 cases in the CSS. (Id. 1119-21). Plea bargaining information -- information not on record facts about whether bargains were accepted and pleas entered, but rather more informal information on whether pleas had been unsuccessfully sought or offered (id. 1152-53) -- was obtained for sixty percent of the cases. (Id. 1153). As petitioner's expert noted (id. 1765-66; see Ped. Oct. Tr. 82) and as commentators have agreed, missing data at a rate of 10 to 12 percent normally does not produce any systematic bias in ultimate outcomes, see, e.c. Vuyanich v. Republic Nat'l Bank of Dallas, 505 F. Supp. 224, 257 (N.D. Tex. 1980), vacated on other grounds, 723 F.2d 1195 (5th Cir. 1984).30

## (b) The Quality of the Data-Gathering Instrument

During the data collection effort for the PRS and the CSS, Baldus and his colleagues developed and employed three separate questionnairies -- two for the PRS, and a third, modified and improved instrument for the CSS. The initial PRS "Supreme Court

<sup>30/</sup> To confirm those theoretical judgments Baldus testified that he performed a wide range of alternative analyses, including those specifically recommended as appropriate by respondent's experts (id. 1501), precisely in order to see whether these missing data might have affected the persistent racial disparities that he found. (Id. 1101; 1694-1708). None did.

Questionnaire\* (see DB 27), 120 pages in length, was devised through a lengthy drafting process. "We sought to identify,"

Balcus testified, "any variable that we believed would bear on [the] matter of the death worthiness of an individual offender's case ... relating to the nature of the crime, the personal characteristics of offender, characteristics of the victim." (Id. 194-95).

The initial Supreme Court Questionnaire proved of unwieldy length for use in the field. (Id. 208). Therefore, although 330 cases in the PRS study were eventually coded using this instrument (id. 200; see DB 28, at 2), Baldus developed a revised version, designated the "Procedural Reform Questionnaire" (see DB 35). The Supreme Court Questionnaire was actually coded in Iowa, by coders who employed copies of original court documents obtained from official Georgia files (see, e.g., DB 29-33), as well from detailed abstracts of the files and a written case summary provided on each case by Baldus' Georgia coders. (See DB 33; Fed. Hab. Tr. 208-15). However, the 351 Procedural Reform Questionnaires were all filled out in Georgia, in the offices of the public agencies involved, with "the source document literally at [their] fingertips when [they] did the coding." (Id. 366).

One major feature of both PRS questionnaires (as well as the CSS questionnaire) was their inclusion of a "narrative summary" section, in which the coders could register important information that was not otherwise covered in the questionnaire. As Professor Baldus explained, "[w]e had no illusion that our questionnaire could capture every nuance of every case. But we wanted to be able to record that somehow. So we entered that

information on these ... summaries." (Id.).31/ Baldus also .. created an "other" category for certain questions to permit a coder to include unforeseen but possibly relevant information.32/

Despite the comprehensiveness of the PRS instruments, the CSS questionnaire (see DB 38) marked a substantial improvement in several respects. First, Baldus included a number of variables to capture the strength of the evidence. (Fed. Bab. Tr. 274-75). Second, he added additional variables on legitimate aggravating and mitigating factors. (Id. 274). Third, Baldus virtually abandoned the "foil entry" format employed in the PRS questionnaires, under which a coder could occasionally find too few foils on which to enter relevant data in response to particular questions, (Id.).33

The District Court apparently misconceived Baldus' testimony concerning these summary documents, stating that "an important limitation placed on the data base was the fact that the questionnaire could not capture every nuance of every case. R. 239" (R. 1159). In fact, the summaries were included precisely to permit Baldus to capture such nuances.

The District Court also treated this "other" coding feature as if it were a deficiency in the questionnaire design, not an asset. (R. 1168). In fact, it permitted Baldus to capture additional information and determine whether some unforeseen factor may have had a systematic impact on his analyses. (Id. 1708-09). Baldus re-analyzed the "other" response in some of his alternative statistical analyses, finding that their inclusion "had no effect whatever. It in no way diminished the racial effects. In fact, it intensified them slightly." (Id. 1710).

The District Court faulted the questionnaires for their use of the foil method (R. 1159-60), without making clear that this method was largely a feature of the PRS study — which played only a minor role in Baldus' analyses. Almost all of the major analyses were conducted on the CSS data. (Id. 1437). Even so, as a check on the impact of the foils, Baldus identified some 50 PRS cases in which there was "overflow information ... that wouldn't fit into the original foils," recoded all of the important variables from the PRS in which the foil method had been employed, re-ran his analyses and "found that the results were identical, and in fact, the race effects became somewhat intensified when this additional information was included." (Id. 1099-1100). A recoding of the only two items on the CSS questionnaire that had retained the foil method obtained identical results. (Id. 1101).

The State's principal expert conceded that the CSS instrument was "an improved questionnaire." (<u>Id</u>. 1392); indeed, respondent never proposed or identified any variables or set of variables, not included in the analyses, that might have eliminated the racial disparities reported by Baldus. (<u>Id</u>. 1609).

# (c) The Care Employed in Coding

The coding process for both studies employed "state-of-the-art" procedures designed to ensure uniform, accurate collection of data. Initial coding for the PRS study was overseen by a law graduate (id. 207-05) who developed with Baldus a written "protocol," a series of careful instructions to coders meant to achieve consistent treatment of issues by regularizing coding practices. (Id. 227-28; see DB 34).

To complete the questionnaire for the CSS study, Baldus employed as his supervisor Edward Gates, one of the two coders who had earlier worked on the PRS study. (Id.). He recruited five coders in a nationwide law school search (id. 301); Baldus flew to Georgia for a week in June of 1981 to train the students, explain the extensive written protocol 34/(id. 310-11); see DB 43) and code practice questionnaires with th m. (Id. 309). Throughout the summer, Baldus maintained daily telephone contacts wit Gates and the coders to resolve any issues presented by the coding. (Id. 400).

The State's expert purported to test the coders' accuracy, not by checking questionnaires obtained through discovery

<sup>34/</sup> The written protocol, as this Court can observe from even a quick review (see DB 43), involved hundreds of instructions on both general coding issues and specific issues for particular questions. The District Court's statement that "the coders were given two general rules to resolve ambiguities of fact," (R. 1957), hardly does justice to the care taken in providing guidance to the coders.

against files in the State's possession, but by running computer comparisons on those cases included in both the PRS and CSS studies. This computer check generated a list of ostensible "mismatches," which the State implied were indicative of multiple coding errors. The District Court apparently credited this argument. (R. 1162).

The State's expert admitted, however, that in compiling "mismatches" he had made no attempt to compare the coding instructions from the PRS and CSS protocols, to see whether in fact coders had been following identical rules. (Id. 1447). In fact, as Baldus and Gates both testified, instructions for coding items in the two studies were often quite different. As a general example, in the PRS, coders were required to draw reasonable inferences from the file (id. 367); in the CSS, they were not. (Id.). By way of further example, protocols for the coding of the (t)(3), (b)(7) and (b)(10) aggravating circumstances were very different in the PRS and CSS studies. In short, as the State was forced to concede, "I don't believe Dr. Katz is indicating either one is necessarily right or wrong in his judgment. He's just indicating he's done a computer count and found these inconsistencies." (Id. 1444).

Professor Baldus testified on rebuttal that he had performed an extensive analysis of the State's alleged mismatches, employing the official file materials and the narrative summaries, to determine whether the inconsistencies represented coding errors, rather than differences in PRS and CSS coding instructions or differences due to data sources relied upon. (Id. 1718-19). (Many of the PRS cases were coded from Georgia Supreme Court materials,

whereas all of the CSS cases were coded from the Pardons and Paroles Board files). Baldus reported that "the average mismatch rate was 6 percent, of which one percent ... were attributable to either a coding error or a keypunching error or data entry error of one sort or another." (Id. at 1719). Baldus added

"that translates into an error rate of approximately one-half of one percent in each of the two studies. Bowever, we found on further examination that ... the error rate in the Procedural Reform Study was higher than it was in the Charging and Sentencing Study.

(Id. 1719-20). Since the CSS study was the basis for most of Baldus' analyses (id. 1437), it appears that the actual error mate was extremely low.  $\frac{35}{}$ 

# (d) The Basic Coding Conventions

The State vigorously attacked one coding convention relied on by Baldus and his colleagues throughout the PRS and CSS studies: the use of a "U" or "unknown" code. Edward Gates explained that coders were instructed to enter a "1" if a fact were "expressly stated in the file" (id. 444), a "2" if the fact were "suggested by the file but not specifically indicated", (id. 444-45), a blank if the fact were inconsistent with the file, and a "U" if

Detween the coding of "several variables" for petitioner McCleskey and his co-defendants (R. 1161). The Court's only reference is to testimony indicating that in the PRS study, petitioner McCleskey was coded as having three special aggravating factors while co-defendant Burney is coded as having only two. Gates testified that coding provisions for co-perpetrators in the CSS study were "far superior ... in terms of precisely defining the differences between the roles that the different actors in the crime played." [Id. 471]. Once again the discrepencies appear to pose no threat to Baldus' analyses, which were largely based on CSS data. Indeed, although different coders were allowed to code the cases of co-perpetrators in the PRS (id. 1110-13), for the CSS, Baldus developed the practice of having a single coder complete questionnaires on all co-perpetrators. (Id. 1124-16).

the coder could not classify the item based on the file.  $(\underline{\underline{Id}}.)$ . As Professor Baldus explained:

what an unknown means basically as it's coded in the Charging and Sentencing Study is that the ... information in the file, was insufficient to support an inference as to the occurrences or the non-occurrence of the event... The idea was that if the file would not support an inference of an occurrence or non-occurrence, then we would further presume that the person who created that file or who had the information that was available in that file would be in a state of ignorance with respect to that fact.

Furthermore, upon the basis of my knowledge of decision making and also on the basis of my practical experience, when people are ignorant about a fact, that fact does not become a determinant in the decision making.

(Ia. 1684-85).

In sum, while the CSS instrument permitted the coders to reflect the distinction between the affirmative non-existence of a fact in the file (coded plank), and uncertainty about its possible non-existence (coded "U"), once statistical analysis began, the "U" was properly recoded as not present.

Baldus offered as an example of this logic the aggravating variable that the "victim pled for his life." If there had been witnesses present during the crime, a coder would code that variable either present or absent, depending on the witnesses' accounts. But if there were no witnesses or other evidence, Baldus reasoned there was no way to make an inference either way, and the item would be coded "U." (Id. 1685-86; see also id. 1155-58).36/

<sup>36/</sup> The District Court's counter-example completely missed the point. Twice the Court adverted to a case in which the defendant told four other people about the murder, but in which the coder was unable to determine from the file whether the defendant had

This explanation casts in a radically different light the District Court's ominous-looking list of variables coded "U" in more than ten percent of the data. (R. 1163-65). Many involve either state-of-mind or relational variables that are often unknown to any outside investigator. For example, while "Defendant's Motive was Sex" may be important if known to a prosecutor or jury, if the fact can be neither eliminated nor confirmed from the evidence, Baldus' rule would be to code it "unknown," and ultimately discount its impact either way by treating it as non-existent.

The District Court appeared to challenge the basic logic of this coding treatment: "the decision to treat the "U" factors as not being present in a given case seems highly questionable ... it would seem that the more rational decision would be to treat the "U" factors as being present." (R. 1163). Yet no expert in the case -- neither petitioner's (id. 1184-90 (Baldus);

<sup>36/ (</sup>continued)

been bragging or expressing remorse. (R. 1160, 1161-62). The Court reasoned that "[a]s the witnesses to his statement were available to the prosecution and, presumably, to the jury, that information was knowable and probably known. It was not, however, captured in the study." (R. 1160).

The Court's reasoning assumes that the defendant must have either been bragging or expressing remorse, and that the prosecutor, by interviewing the four witnesses, must have ascertained which. It is equally likely, however, that the defendant told others about the murder without either bragging or expressing remorse. In that case, the file would properly reflect the contact with the witnesses, but would not reflect bragging or remorse. Under Baldus' rules the coder would code "unknown" and the bragging and remorse would ultimately be treated as not having occurred. Only if the prosecutor and jury had known of bragging or remorse, but the parole officer had somehow failed to learn of it in his review of the transcript, in his talks with the police and the District Attorney, or in his review of police files, would "U" be a misleading code.

1761-63 (Berk)), nor respondent's (<u>id</u>. 1503; (Ratz); 1656-58 (Burford)) suggested that a "U" should be coded as "1" or "present" for purposes of analysis. Indeed, Dr. Berk, petitioner's rebuttal expert, testified that the National Academy of Science panel on sentencing had expressly considered this issue during its two-year study of sentencing research and had endorsed the very approach Baldus adopted. (<u>Id</u>. 1761-63). The District Court's conclusion that a contrary code should have been used is without foundation in the record.37/

(iii) The Statistical Methods Were Valid and Appropriate

Having gathered and compiled their data, Baldus and his colleagues employed a wide variety of statistical procedures to analyze it, including cross-tabular comparisons (id. 683, 701-05), unweighted least squares regressions (id. 689-700), weighted least squares regressions (id. 1222-25), logistic regressions (id. 917-18), index methods (id. 1234-36), and qualitative case comparisons, or so-called cohort studies, (id. 1049-59).

Baldus employed these methods on progressively more elaborate "models," or groups of variables chosen to determine whether the race-of-victim and race-of-defendant disparities could be reduced

<sup>37/</sup> Moreover, Baldus testified that, among a series of alternatives analyses he conducted to test the effects of his "U" coding rules (see generally Ped. Hab. Tr. 1194-1704 and DB 120-123), he recoded unknowns as "1" or "present" just as the Court had recommended. The effects on racial disparities "were within a percentage point of one another and all the co-efficients that were statistically significant in one analysis were in the other." (Id. 1701). Another alternative analysis, employing "list-wise deletion" of all cases with "U" codes, recommended by the State's principal expert, (id. 1501-02), also had no adverse effect (id. 1695-96); see DB 120); indeed it increased the race-of-victim coefficient by two percentage points.

or eliminated: Baldus explained that no single method of statistical analysis, and no single model, was invariably infallible, but that if statistical results could persist, no matter what methods were employed, a researcher could have great confidence that the "triangulated" results reflected real differences:

It's this widespread consistency that we see in the results ... it's this triangulation approach, if you will, that provides the principal basis for our opinions that there are real racial effects operating in the Charging and Sentencing System.

(Id. 1082-83).

The District Court failed throughout to appreciate the logic of this approach. Instead, it rigidly, and petitioner submits erroneously, refused to admit 'except as to show process' a series of relevant models, solely because they did not include variables the Court thought should be included. (See id. 742-46; 755; 760; 768; 771-73; 779; 981-82; 984). Indeed, the Court's approach throughout the hearing was to fault Baldus' models for failure to account for unspecified 'unique' factors. (E.g., id. 925; Fed. Oct. Tr. 92).38/ The Court reasoned -- contrary to the expert testimony of Baldus (Fed. Hab. Tr. 808-19); Woodworth (Fed. Oct. Tr. 55); and the State's expert Dr. Burford (id. 1673)

<sup>38/</sup> The Court also overlooked in its opinion that, at the invitation of petitioner's experts, it was able to test its own "Lawyer's Model," constructed by the District Court during the August 1983 hearing to reflect those factors it believed to be most likely to predict the sentencing outcome. (Id. 810; 1426; 1475-76; 1800-03; see C-1). Baldus' subsequent analyses employing the Court's own model showed sharp differences in sentencing outcomes by racial category. (R., 735, 736). Strong and statistically significant race-of-victim effects were reflected upon regression analysis, whether employing the least squares (R. 738) or the logistic approach (R. 739), and Baldus averred that these analyses further reinforced his earlier testimony. (See generally R. 731-752).

-- that since Balous testified that he had identified 230 variables that might be expected to predict who would receive death sentences, "it follows that any model which does not include the 230 variables may very possibly not present a whole picture." (R. 1171). If respondent had demonstrated that petitioner's racial disparities only appeared in smaller models, but disappeared or were substantially reduced whenever 230-variable analyses were conducted, the District Court's position would rest on logic and precedent. Since, however, as we will demonstrate below, the race-of-victim disparities continue to show strong effects in large models as well as small, the District Court's position is without support. As a matter of fact, it is clearly erroneous; not even the State's expert advanced such a contention. As a matter of law, it has no allies. No prior case has ever intimated that only large-scale models can constitute relevant evidence in a statistical case. See, e.g., Eastland v. Tennessee Valley Authority, 704 F.2d 613, 622-23 n.14 (11th Cir. 1983).

## (iv) The Results Make Out A Prima Facie Case Of Racial Discrimination

To begin his analysis, Baldus first calculated sentencing outcomes by race, unadjusted for any additional variables or background factors. 39/ The pattern he found (DB 63) revealed marked racial disparities: 40/

<sup>39/</sup> Each of these analyses was conducted on the CSS data, unless otherwise noted.

<sup>40/</sup> These results closely parallel earlier Georgia findings. Bowers & Pierce, "Arbitrariness and Discrimination under Post-Furman Capital Statutes," 26 CRIMF & DELING. 563, 599 (1980).

Black Defendant/	White Defendant/	Black Defendant/	White Defendant/
White Victim	White Victim	Black Victim	Black Victim
(50/228)	(58/745)	(18/1438)	.03

(Id. 730-31). However, Baldus made it clear that "[t]his table merely generates an hypothesis ... it has no controls. There are many rival hypotheses that could explain these relationships."

(Io. 731).

Baldus thus began a series of analyses, steadily adding background variables to his multiple regression analyses, thereby "controlling for" or holding constant the effect of those factors, to see if an independent racial effect would persist.

Baldus found strong racial effects when he controlled for all of Georgia's statutory aggravating circumstances (DB 78) and in addition, for 75 mitigating factors (DB 79). In DB 80, Baldus presented an important table which compared the racial effects in several, increasingly complex models. Excerpts from that table reveal the following:

Before Adjustment for any Back- ground Factors		After Adjust- ment for the Other Vari- able Racial	After further Simultaneous Controls for Nine Background Variables	After Simultaneous Control for 230 + Non Racial Factors
Race of Victim	.10	(.0001)	(.001)	.06
Race of Defendant	03 (.03)	(.001)	(.13)	(.01)

Baldus noted that while the coefficients41/ for race-of-victim declined somewhat as additional background variables were added

<sup>41/</sup> Professor Baldus testified that a regression coefficient is a summary figure that provides the average disparity, with

to the analysis, and that while the measures of statistical significance also declined, 42/ both figures remained significant. Baldus explained that it is "quite unusual to see an event like that," since so many of the 230 variables were themselves correlated with both the race of the victim and the sentencing outcome, a fact that could be statistically expected to suppress the magnitude of the racial variable. (Id. 804).

and race-of-defendant variables in sentencing decisions, Baldus compared them with other important sentencing variables, rank-ordered by their coefficients (DB 81, 82). The impact of the race-of-victim variable proved of the same order of magnitude as major aggravating factors such as whether the defendant had a prior record of murder, or whether the defendant was the prime mover in the crime (id. 812-15).

Baldus then continued his analyses, looking at other models that might eliminate the racial effects. Petitioner's Exhibit DB 83 includes a variety of such models, some employing all 230 of Baldus' recoded variables. All of these models show

<sup>41/</sup> continued

and without the presence of a variable, across all the cases. (Id. 690-94). A coefficient of .06 for a variable means that the presence of that variable, after controlling for all other factors in the model, would increase the outcome of interest (here, a death sentence) by an average of six percentage points. (Id. 692-93).

<sup>42/</sup> Statistical significance, Baldus explained, is a measure of the likelihood that if, in the universe of cases as a whole, there are in fact no disparities, one could have obtained disparate results merely by chance. (Id. 712-15). Normally expressed in "p" values, a figure of .01 means the likelihood that the coefficient is merely a chance finding is 4-in-100; a figure of .0001 would mean 1-in-10,000.

strong race-of-victim and race-of-defendant effects. 43/

# I. W.L.S. REGRESSION RESULTS

	Δ	<u>B</u>	2	
Non-Racial		Coefficients and Level of Statistical Significance		
	Variables in The Analysis	Race of Victim	Race of Defendant	
<b>a</b> )	230 + aggravating, mitigating, evidenti- ary and suspect factors	(.02)	(.02)	
, p)	Statutory aggravating circumstances and 126 factors derived from the entire file by a factor analysis	(:01)	(.01)	
e)	44 non-racial vari- ables with a statisti- cally significant relationship (P<.10) to death sentencing	(.0002)	(.0004)	
e)	14 legitimate, non- arbitrary and statis- tically (P<.10) sig- nificant factors screened with W.L.S. regression procedures	.06 (.001)	(.001)	
• )	13 legitimate, non- arbitrary and statis- tically significant (P<.10) factors screened with logistic regression procedures	.06	(.02)	

Baldus adopted yet a different approach to analyze precisely where in the system the racial effects were having their impact. Employing a recognized social science technique,

<sup>43/</sup> In light of DB 81 and DB 83, as well as DB 102 and DB 105, the District Court was clearly erroneous in asserting that "[t]he best models which Baldus was able to devise which account to any significant degree for the major non-racial variables, including strength of the evidence, produce no statistically significant evidence that race plays a part in either of those decisions in the State of Georgia." (R. 1187).

the "index method," (see id. 877, 1234-36) he sorted the cases into roughly equal groups based upon their predicted likelihood of receiving a death sentence (id. 877-79); he then analyzed racial disparities within those groups, which included increasingly more aggravated cases. (See DB 89). Noting that the likelihood of a death sentence rises dramatically in the most aggravated groups, Baldus further divided the top groups into eight subgroups for analysis. As the excerpted portion of that table (DB 90) reveals, there are clear race-of-victim differences -- especially in the middle range of cases -- which are statistically significant overall at a .01 (1-in-100) level.

A	B	2	2	E
Predicted Chance of a Death Sentence 1 (least)	Average Actual Sentencing Rate for the Cases	Death Sentencing Rates for Black Defendant Involving White Black		Arithmetic Difference in Rate of the Victim
to 8 (highest)	at Each Level	Victim Cases	Victim Cases	Rates (Col. C- Col.
1	(0/33)	. (0/9)	(0/19)	.0
2	(0/55)	(0/8)	(0/27)	. 0
3	.08 (6/76)	.30	(2/18)	.19
4	(4/57)	.23	(0/15)	.23
5	(15/58)	.35 (9/26)	.17 (2/12)	٠ ٦ 🛢
6	(11/64)	(3/8)	(1/20)	.33
7	.86 (\$1/58)	.91	.75 (6/8)	.16

Baldus observed that there was little disparity in the less aggravated cases, "[b]ut once the death sentencing rate begins to rise, you'll note that it rises first in the white

victim cases. It rises there more sharply than it does in the black victim cases." (Id. 882-83).44/ Baldus testified that, in his opinion, these data supported an hypothesis first advanced by Harry Kalven and Hans Zeisel in their work, THE AMERICAN JURY 164-67 (1966),

"what they call the liberation hypothesis and in short what it was, that the exercise of discretion is concentrated in the area where there's real room for choice.

[W]hen you look at the cases in ... the midrange, where the facts do not call clearly for one choice or another, that's where you see there's room for exercise of discretion ... the facts liberate the decision maker to have a broader freedom for the exercise of discretion, and it is in the context of arbitrary decisions that you see the effects of arbitrary or possibly impermissible factors working.

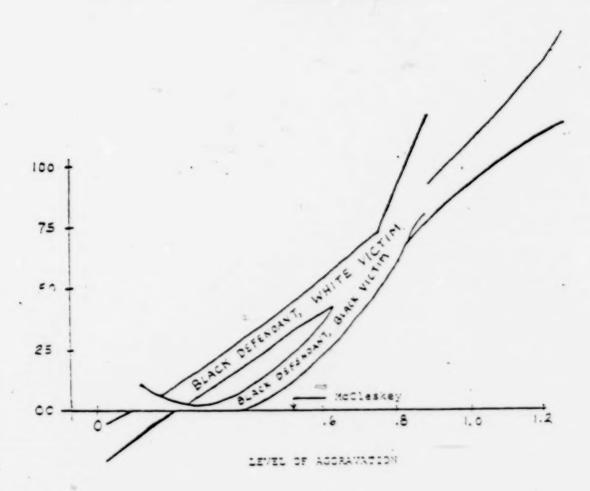
(Id. 844)

Baldus and Woodworth marshalled a substantial body of evidence in support of this liberation hypothesis during the evidentiary hearing. The most striking illustration was the figure constructed by Woodworth to illustrate the differential rates at which the likelihood of receiving a death sentence rises in Georgia for black victim and white victim cases, given similar levels of aggravation. Woodworth noted that, according to this graph, petitioner Warren McCleskey's level of aggravation

"place(s) him in a class of defendants where there is roughly a

<sup>44/</sup> The District Court apparently misunderstood those tables. It noted, as if the fact were contrary to Baldus' testimony, that DB 89 reports 'nigher racial disparities in the most aggravated level of cases," (emphasis added). It also discounted the results in DB 90 because, unlike DB 89, it was purportedly not 'predicated on a multiple regression analysis." (R. 1205). In fact, the liberation hypothesis predicts that disparities would exist only at the higher levels of DB 89, a table that includes all cases — most of them very unaggravated. It is only in DB 90, which comprises the subset of cases in which the risk of a death sentence becomes significant, that the disparities in the middle range appear. (Fed. Hap. Tr. 882-83) Like DB 89, moreover, DB 90 was built by employing regression analysis; the Court's surmise to the contrary is clearly erroneous.

Figure 2: Midrange Model With Interactions and Nonlinearities--



<sup>2/</sup> The curves represent 95% confidence bounds on the average death sentencing rate at increasing levels of aggravation (redrawn for computer output).

twenty percentage point of greater disparity between black victim cases [and] ... white victim cases.\* (Id. 1734-35).

## [See GH B]

which we cannot fully review within the confines of this brief.

A few, however, require additional attention. The District Court, unguided by experts for either petitioner or respondent, suggested that DB 95 was "perhaps the most significant table in the Baldus study," since it "measures the race of the victim and the race of the defendant effect in the prosecutorial decision to seek the death sentence and the jury decision to impose the death sentence."

(R. 1185). The Court noted that "[t]he coefficients produced by the 230-variable model on the Charging and Sentencing Study data base [in DB 95] produce no statistically significant race of the victim effect either in the prosecutor's decision ... or in the jury sentencing decision." (R. 1186).

The Court's statement in a literal sense is accurate. It disregards, however, that the CSS figure, P=.06, is in fact marginally significant; that the equivalent PRS model does produce a statistically significant result; 45/ that the smaller model results were highly significant; 46/ and that an analysis

<sup>45/</sup> The Court discounted this figure as "totally invalid for [the PRS Model] contains no variable for strength of the evidence." (R. 1185). In so doing, it ignored Baldus' obvious point that strength of the evidence was substantially controlled for in the PRS, since the universe was limited by definition to cases in which a conviction -- presumably based on evidence sufficient beyond a reasonable doubt -- had been obtained. (Fed. Hab. Tr. 124-25).

<sup>46/</sup> The Court stated that it "knows of no statistical convention which would permit a researcher arbitrarily to exclude factors on the basis of artificial criteria." (R. 7186). Baldus in fact testified without contradiction that such a procedure is commonly used in statistical analyses. (The State's principal expert employed a variant of it throughout his testimony.) (See, e.g., Resp. Ex. 26, 43, 45, 50).

of the <u>combined</u> effect of the prosecutorial and jury decision (see DB 98) showed a series of highly statistically significant race-of-victim effects. In truth, what the Court has done is to identify one of the very few large model coefficients for the race-of-victim variable in either study that is <u>not</u> statistically significant, brand it as a key figure, and then disparage all collateral evidence that places it in context. Such an approach to petitioner's comprehensive statistical evidence constitutes a legally insufficient basis to reject petitioner's persistent racial, findings.47/

The second series of analyses that require comment are those directed toward Fulton County (where petitioner was tried) and toward petitioner's own case. Baldus conducted both quantitative and qualitative studies of death sentencing rates in Fulton County which were reflected in DB 106 through DB 116.48/Baldus testified that a repetition in Fulton County of the progressively more elaborate analyses he had conducted statewide "showed a clear pattern of race-of-victim disparties in death sentencing rates among the cases which our analyses suggested were death eligible." (Id. 983). Regression analyses at succes-

of petitioner or his experts in discussing this exhibit, noting that "we are given no outcomes based on the larger scaled regression," although the Court "does not understand that the analysis was impossible, but instead ... that because of the small numbers the result produced may not have been statistically significant." (R. 1187). The Court is wrong; such analyses employing these small numbers are statistically inappropriate. See e.g., Balinski and feldt, "The Selection of Variables in Multiple Regression Analysis," 7 J. EDUC. MEASUREMENT, 151 (1970). We note, morever, that both in this table and elsewhere, petitioner and his experts regularly reported non-significant findings even when statistical procedures could be appropriately conducted upon them.

<sup>48/</sup> The District Court refused to admit DB 106 (id. 979), DB 107 (id. 981-92), and DB 108 (id. 984), holding that because they did not sufficiently control for background variables they were irrelevant. This holding is legally erroneous.

sive stages in the charging and sentencing process revealed highly significant racial disparities at two points: the prosecutor's plea bargaining decision and the prosecutor's decision to advance a case to the penalty phase. (Id. 1038-39). While Baldus necessarily tempered his evaluation of these results because of the small size of the universe, (id. 1040-43), he noted that "these coefficients are very large, it's not as if we're dealing with small coefficients, these are substantial. So that leads me to believe that what you're seeing is evidence of a real effect." (Id. 1044).

To supplement this statistical picture, Baldus conducted two cohort studies, one of the "near neighbors" cases, those which scored most like petitioner McCleskey in an overvall "aggravation index." (Id. 986-91). Baving identified 32 near neighbors, Baldus sorted them into typical, more aggravated, and less aggravated groups. (Id. 991). Computing death sentencing rates by race of victim and race of defendant, Baldus found significant disparities; in McCleskey's group, the disparity was .40. (Id. 993).

In a second cohort study Baldus examined 17 defendants involved in the homicides of police officers. Two among the seventeen, including petitioner McCleskey, went to a penalty trial. The other defendant, whose police victim was black, received a life sentence. (Id. 1050-62; DB 116). Petitioner's sentence was, of course, death. "[T]he principal conclusion that one is left with," Baldus testified, "is that ... this death sentence that was imposed in McCleskey's case is not consistent with the disposition of cases involving police officer victims in this county." (See also 1085-86).

Finally, Dr. George Woodworth, petitioner's expert statistician, testified concerning the likely impact of the

racial variables on a case at petitioner McCleskey's level of aggravation. Woodworth noted that, using his exhibit GW-8, he had computed the race-of-victim disparity at petitioner's level of aggravation to be 22 percentage points. (Id. 1738). He then turned to DB 90 and observed an 18 percentage point disparity by race at petitioner's level. (Id. 1739). Calculated by use of an unweighted logistic regression, the racial disparity was 23 percent. (Id. 1740). Woodworth concluded:

So it would seem that at Mr. McCleskey's level of aggravation the average white victim case has approximately a twenty percentage point higher risk of receiving the death sentence than a similarly situated black victim case.

(Id. 1740).49/

Petitioner's final expert was Dr. Richard Berk, a highly qualified social scientist (see RB 1) and a frequent consultant on criminal justice matters to the United States Department of Justice. (Id. 1753). Berk in fact had served on a distinguished National Academy of Sciences panel charged with reviewing all previous research on criminal sentencing issues in order to set standards for the conduct of such research. (Id. 1761-62). After reviewing Baldus' studies,

<sup>49/</sup> Beyond this statistical and qualitative evidence on cases Tike petitioner's, petitioner introduced the deposition of District Attorney Lewis Slayton. (Id. 1319). In that deposition, Slayton acknowledged that his office has no express written or unwritten policies or guidelines to govern the disposition of homicide cases at the indictment stage (Dep., 10-12), the plea stage, (Dep. at 26) or the penalty stage (Dep., 31, 41, 58-59). Moreover, murder cases in his office are assigned at different stages to one of a dozen or more assistant district attorneys (Dep., 15, 45-48), and there is no one person who invariably reviews all decisions on homicide dispositions. (Dep., 12-14, 20-22, 28, 34-38). Slayton confessed that his office does not always seek a sentencing trial in a capital case, even when statutory aggravating circumstances are present (Dep., 38-29). Slayton testified further that the decisionmaking process in his office for seeking a death sentence is "probably... the same" as it was in the pre-Furman period. (Dep., 59-61).

analyzing the data, and reviewing Baldus' preliminary report, Berk's opinion on Baldus' study, especially its findings on race, was virtually unqualified:

This has very high credibility, especially compared to the studies that [The National Academy of Science panel] ... reviewed. We reviewed hundreds of studies on sentencing over this two-year period, and there's no doubt that at this moment, this is far and away the most complete and thorough analysis of sentencing that's been done. I mean there's nothing even close.

(Id. 1766.)

Berk's conclusion is fully warranted. The data was reliable and carefully compiled. The regression analyses relied upon by petitioner were properly conducted by leading experts in the field. These analyses were carefully monitored for possible statistical problems, and they have been found to be both statistically appropriate and accurate in their assessment of the presence and magnitude of racial disparities in capital sentencing in Georgia. These disparities are real and persistent; they establish petitioner's prima facie case.

## C. The Law: The District Court Misapplied the Law In Rejecting 'Petitioner's Prima Facie Case

We have already pointed out many instances in which the District Court misread the record, overlooked testimony, or made findings contrary to the evidence presented by both parties -- petitioner and respondent alike. Yet the principal errors committed by the District Court on this record stem from its apparent misunderstanding of statistical proof, and its misapplication of controlling legal authority. In effect, the District Court created for itself a roster of new legal standards and principles to judge the quality of petitioner's data, the admissibility of his exhibits, the appropriateness of his models, and even the usefulness of

3

wv ;

LIGINAL

NO. 84-6811

Supreme Court, U.S. F I L E D

JUL 1 1985

ALEXANDER L. STEVAS

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

WARREN MCCLESKEY,

Petitioner,

! V.

RALPH M. KEMP, SUPERINTENDENT,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR THE RESPONDENT

v MARY BETH WESTMORELAND Assistant Attorney General Counsel of Record for Respondent

MICHAEL J. BOWERS Attorney General

MARION O. GORDON First Assistant Attorney General

WILLIAM B. HILL, JR. Senior Assistant Attorney General

Please Serve:

MARY BETH WESTMORELAND 132 State Judicial Bldg. 40 Capitol Square, S.W. Atlanta, Georgia 30334 (404) 656-3349

RECEIVED

JUL 1 1985

OFFICE OF THE CLERK SUPREME COURT, U.S.

5094

## QUESTIONS PRESENTED

I.

Did the Eleventh Circuit Court of Appeals properly conclude that the Petitioner had failed to show that the death penalty in Georgia was applied in an arbitrary or capricious manner?

II.

Did the Eleventh Circuit Court of Appeals properly conclude that Petitioner had failed to prove racial discrimination in Georgia's capital sentencing system?

III.

Did the Eleventh Circuit Court of Appeals properly conclude that there was no violation of <u>Giglio v. United States</u> or that any such violation was harmless?

IV.

Did the Eleventh Circuit Court of Appeals properly conclude that the trial court's instruction on intent was, at most, harmless error?

V.

Did the Eleventh Circuit Court of Appeals properly conclude that Petitioner was not entitled to relief on his challenge to the "death-qualification" of the trial jury?

# TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
STATEMENT OF THE CASE	1
STATEMENT OF THE FACTS	4
REASONS FOR NOT GRANTING THE WRIT	
I. THE ELEVENTH CIRCUIT COURT OF APPEALS PROPERLY CONCLUDED THAT THE PETITIONER FAILED TO SHOW THAT THE DEATH PENALTY WAS APPLIED IN EITHER AN ARBITRARY OR DISCRIMINATORY MANNER	7
THERE WAS NO VIOLATION OF  GIGLIO V. UNITED STATES IN THE  INSTANT CASE	29
III. THE ELEVENTH CIRCUIT COURT OF APPEALS PROPERLY CONCLUDED THAT ANY ALLEGED BURDEN-SHIFTING CHARGE WAS HARMLESS BEYOND A REASONABLE DOUBT	38
IV. THE ELEVENTH CIRCUIT COURT OF APPEALS PROPERLY DENIED RELIEF ON PETITIONER'S ASSERTION THAT THE JURY WAS IMPERMISSIBLY QUALIFIED AS TO CAPITAL PUNISHMENT	41
CONCLUSION	44
CERTIFICATE OF SERVICE	45

# TABLE OF AUTHORITIES

	Page(s)
Alcorta v. Texas, 355 U.S. 28 (1957)	32,34
Blalock v. State, 250 Ga. 441, 298 S.E.2d 477 (1983)	36
Chapman v. California, 386 U.S. 18 (1967)	38
Connecticut v. Johnson, 460 U.S. 73 (1983)	38,39,40
Engle v. Koehler, 707 F.2d 241 (6th Cir. 1983),  aff'd by an equally divided court, U.S, 104 S. Ct. 1673 (1984)	40
(per curiam)	
Enmund v. Florida, 458 U.S. 782 (1982)	14,15
Prancis v. Franklin, U.S, (1985)	38
Franklin v. Francis, 720 F.2d 1206 (11th Cir. 1983)	38
Giglio v. United States, 405 U.S. 150 (1972)	passim
Godfrey v. Georgia, 446 U.S. 420 (1980)	19
Gregg v. Georgia, 428 U.S. 153 (1976)	19,26
Grigsby v. Mabry, 758 F.2d 226 (8th Cir. 1985) (en banc)	41
Keeten v. Garrison, 742 F.2d 129 (4th Cir. 1984)	41
<pre>Lamb v. Jernigan, 683 F.2d 1332 (11th Cir. 1982),</pre>	38
McCleskey v. Kemp, 753 F.2d 877 (11th Cir. 1985) (en banc)	passim
McCleskey v. State, 245 Ga. 108, 263 S.E.2d 146, cert. denied, 449 U.S. 891 (1980)	2
McCleskey v. Zant, 580 F.Supp. 338 (N.D.Ga. 1984)	
Napue v. Illinois, 360 U.S. 264 (1959)	93,34,35
Pullman-Standard v. Swint, 456 U.S. 273 (1982)	24
Smith v. Balkcom, 660 F.2d 573 (5th Cir. Unit B 1981), cert. denied, 459 U.S. 882 (1982)	18,41
Smith v. Kemp, 715 F.2d 1459 (11th Cir.), cert. denied, U.S, 104 S.Ct. 510 (1983)	35
Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978), cert. denied, 440 U.S. 976 (1979)	18,41
Stephens v. Kemp, 464 U.S. 1027 (1984)	

Sullivan v. Wainwright, 464 U.S. 109, 104 S.Ct. 450, 78 L.Ed.2d 210 (1983)	22
Taylor v. Louisiana, 419 U.S. 522 (1975)	42
Teamsters v. United States, 431 U.S. 324 (1977)	17
United States v. United States Gypsum Company, 333 U.S. 364 (1948)	24
Village of Arlington Heights v. Metropolitan  Housing Development Corp, 429 U.S. 252 (1977)	20,21
Wainwright v. Witt, U.S, 105 S. Ct. 844 (1985)	42
Washington v. Davis, 426 U.S. 229 (1976)	20,21
Yick Wo v. Hopkins, 118 U.S. 356 (1886)	20
Statutes Cited:	
O.C.G.A. \$ 17-10-30(b)(2); Ga. Code Ann. \$ 27-2534.1(b)(2)	1
O.C.G.A. § 17-10-30(b)(8); Ga. Code Ann. § 27-2534.1(b)(8)	1

NO. 84-6811

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

WARREN McCLESKEY,

Petitioner,

v.

RALPH M. KEMP, SUPERINTENDENT,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

# BRIEF IN OPPOSITION FOR THE RESPONDENT

### PART ONE

# STATEMENT OF THE CASE

On June 13, 1978, the grand jury of Fulton County, Georgia returned a three count indictment against the Petitioner, Warrand McCleskey and his three co-indictees, David Burney, Bernard Dupree and Ben Wright, Jr., charging said individuals with the offense of murder and two counts of armed robbery. The Petitioner was tried separately beginning on October 9, 1978, and was found guilty on all three counts. The jury imposed the death penalty after a separate sentencing proceeding on the murder charge, finding that: (1) the offense of murder was committed while the Petitioner was engaged in the commission of another capital felony, and (2) the offense of murder was committed against a peace officer, corrections employee or fireman while engaged in the performance of his official duties. See O.C.G.A. §§ 17-10-30(b)(2) and (b)(8); Ga. Code Ann. §§ 27-2534.1(b)(2) and (b)(8). Consecutive life sentences were imposed on the two counts of armed robbery.

The Petitioner appealed his convictions and sentences to the Supreme Court of Georgia which court affirmed all convictions and sentences. A subsequent petition for a writ of certiorari was denied by this Court. McCleskey v. State, 245 Ga. 108, 263 S.E.2d 146, cert. denied, 449 U.S. 891 (1980).

On January 5, 1981, the Petitioner filed a petition for habeas corpus relief in the Superior Court of Butts County, Georgia. An evidentiary hearing was held by that court on January 30, 1981. The Superior Court of Butts County denied habeas corpus relief in an order dated April 8, 1981. The Supreme Court of Georgia denied the subsequent application for a certificate of probable cause to appeal on June 7, 1981. The ensuing petition for a writ of certiorari was denied by this Court on November 30, 1981.

On December 30, 1981, the Petitioner filed a petition for habeas corpus relief in the United States District Court for the Northern District of Georgia. Leave of court was granted for both parties to conduct discovery so that evidence could be obtained concerning a statistical challenge to the imposition of the death penalty in the State of Georgia. An evidentiary hearing was held during the month of August, 1983 and an additional hearing was held in October, 1983.

The district court entered an order on February 1, 1984.

McCleskey v. Zant, 580 F.Supp. 338 (N.D.Ga. 1984). That court rejected all issues raised in the petition except for the alleged undisclosed deal with a witness. The court directed that habeas corpus relief be granted as to that issue and ordered that the conviction and sentence for malice murder be set aside, but still affirmed the conviction for armed robbery.

Both parties appealed the decision of the district court to the United States Court of Appeals for the Eleventh Circuit.

On March 28, 1984, the Eleventh Circuit Court of Appeals directed that the instant case be heard initially by the court sitting en banc. On January 29, 1985, the en banc court issued

an opinion affirming all convictions and sentences. McCleskey v. Kemp, 753 F.2d 877 (11th Cir. 1985) (en banc). Petitioner subsequently filed the instant petition for a writ of certiorari in this Court challenging the decision by the Eleventh Circuit Court of Appeals.

#### PART TWO

#### STATEMENT OF FACTS

The evidence presented at Petitioner's trial showed that on May 13, 1978, he and three co-defendants committed an armed robbery at the Dixie Furniture Store in Atlanta, Georgia. During the course of the robbery, the Petitioner entered the front of the store, while his three co-defendants entered from the back of the store. Petitioner was positively identified at trial as one of the participants in the robbery. (T. 231-232, 242, 250).

Following the arrest of the Petitioner, he was taken to Atlanta, Georgia. On May 31, 1978, the Petitioner made a confession to the police in which he admitted his participation in the robbery, but denied that he shot Atlanta Police Officer Frank Schlatt. A <u>Jackson v. Denno</u> hearing was held at trial and the court determined that the confession was freely, intelligently and voluntarily made. (T. 426-505).

Petitioner's co-defendant, Ben Wright, testified at trial and related the details of the robbery and murder. Ben Wright testified that while he carried a sawed-off shotgun, the Petitioner carried a .38 caliber nickel-plated, white-handled pistol. (T. 654-656, 648-649). Wright testified that co-defendant Burney had a blue steel, snub-nosed .32 caliber pistol while Dupree had a blue steel .25 caliber pistol. (T. 649-651).

Petitioner's trial in the Superior Court of Fulton County.

S.H.T. will be used to refer to the transcript of the state habeas corpus hearing in the Superior Court of Butts County, Georgia. F.H.T. will be used to refer to the transcript of the evidentiary hearing held by the district court beginning on August 8, 1983. F.H.T. II will be used to refer to the subsequent evidentiary hearing conducted in the district court.

The testimony revealed that while Dupree, Burney and Wright held several employees in the back of the store, the Petitioner was in the front. Employee Classic Barnwell activated a silent alarm, resulting in the arrival of Officer Schlatt. Shortly after Schlatt entered the front of the store, he was shot. After hearing two shots, Wright saw the Petitioner running out of the front of the store. Wright, Dupree and Burney ran out of the back. When they all arrived at the car, Petitioner stated that he shot the police officer. (T. 658-659).

Mr. Everett New and his wife were stopped in their automobile at a redlight near the Dixie Furniture Store. They saw Officer Schlatt arrive at the scene, draw his pistol and enter the store. Mr. New testified that approximately thirty seconds later he heard two shots and shortly thereafter saw a black man running out of the front door carrying a white handled pistol; however, he could not identify that individual. (T. 331-333).

Petitioner testified in his own behalf at trial and stated that he knew Ben Wright and the other co-defendants, but that he had not participated in the robbery. Petitioner relied on an alibi defense, stating that Wright had borrowed his car and that Petitioner had spent the day at his mother's house and at some apartments in Marietta playing cards. Petitioner named several people who had been present at these apartments, but did not present any of those persons to testify. (T. 811).

Petitioner denied that he made a statement to Lieutenant

Perry that he had participated in the robbery and stated that

he made a false statement to Detective Jowers because of the

alleged evidence the police had against him (two witnesses who

had identified him, the description of his car and a statement

from David Burney), because of his prior convictions and

because he did not have good alibi. (T. 823-824).

Petitioner was also identified at trial by two witnesses who had observed him take part in a prior similar robbery. Mr. Paul David Ross, manager of the Red Dot Grocery Store, had

previously identified the Petitioner from a set of color photographs. Ross also testified that during the course of the Red Dot robbery, his nickel-plated .38 revolver was stolen.

Ms. Dorothy Umberger also saw the Petitioner during the April 1, 1978, robbery of the Red Dot Grocery Store. She testified that she was ninety percent certain that the Petitioner was one of the men who had robbed her. She based her identification on viewing the Petitioner at the scene of the crime and also identified the Petitioner from a photographic display.

In rebuttal, the State presented the testimony of Arthur Keissling. This witness testified that he had seen the Petitioner during the robbery of Dot's Produce on March 28, 1978. His identification of the Petitioner was positive. (T. 887-889, 896).

The State also presented, in rebuttal, the testimony of Office Gene Evans. Mr. Evans had been incarcerated in the Fulton County jail in a cell located near the Petitioner and Bernard Dupree. Evans related that the Petitioner had talked about the robbery while in custody and had admitted shooting Officer Schlatt. (T. 869-870).

Respondent will set forth further facts as necessary to address the issues raised in the instant petition.

#### PART THREE

### REASONS FOR NOT GRANTING THE WRIT

I. THE ELEVENTH CIRCUIT COURT OF APPEALS

PROPERLY CONCLUDED THAT THE PETITIONER

FAILED TO SHOW THAT THE DEATH PENALTY

WAS APPLIED IN EITHER AN ARBITRARY OR

DISCRIMINATORY FASHION.

Petitioner has raised two different challenges to the Eleventh Circuit Court of Appeals' opinion in the instant case. Petitioner raises a claim based on an Eighth Amendment challenge, as well as a challenge under the Equal Protection Clause of the Fourteenth Amendment and asserts that the death penalty in Georgia should be found to be violative of either or both of these Constitutional provisions. Respondent submits that the Eleventh Circuit Court of Appeals and the district court properly rejected both challenges.

#### A. The Evidence Presented.

Before examining the law to be applied in the instant case, it is pertinent to review the evidence presented to the district court for its consideration. The district court's opinion sets forth a detailed statement of the scope of the studies presented, noting that two different studies were conducted on the criminal justice system in Georgia, that is, the Procedural Reform Study and the Charging and Sentencing Study. See McCleskey v. Zant, supra at 353. Petitioner presented his case primarily through the testimony of Professor David C. Baldus and Dr. George Woodworth. Petitioner also presented testimony from Edward Gates as well as an official from the State Board of Pardons and Paroles. The State offered the testimony of two expert witnesses, Dr. Joseph Katz and Dr. Roger Burford. Petitioner then called Professor Baldus and Dr. Woodworth in rebuttal and also presented testimony from Dr. Richard Berk.

The Eleventh Circuit Court of Appeals noted the following findings by the district court in which the district court specifically concluded that the Petitioner failed to make out a prima facie case of discrimination adm discounted the Baldus study based on the following rationale:

The Court discounted the disparity shown by the Baldus study on the ground that the research (1) showed substantial flaws in the date base, as shown in tests revealing coding errors and mismatches between items on the Procedural Reform Study (PRS) and Comprehensive (sic) Sentencing Study (CSS) questionnaires; (2) lacked accuracy and showed flaws in the models, primarily because the models do not measure decisions based on knowledge available to decision-maker and only predicts outcomes in 50 percent of the cases; and (3) demonstrated multi-collinearity among model variables, showing interrelationship among variables and consequently distorting relationships, making interpretation difficult.

McCleskey v. Kemp, supra, 753 F.2d at 886. The Eleventh Circuit also acknowledged the district court found that the State had rebutted any prima facie case that may have been shown because the district court found that the results were not the product of good statistical methodology and that there were other explanations available for the results of the study. Id. The district court finally concluded that the Petitioner had failed to carry his burden of persuasion to show that the death penalty was being imposed on the basis of the race of the defendant as well. "Petitioner conceded that the study is incapable of demonstrating that he was singled out for

the death penalty because of the race of either himself or his victim, and, therefore, Petitioner failed to demonstrate that racial considerations caused him to receive the death penalty." Id.

In making its analysis, the Eleventh Circuit Court of Appeals assumed without deciding that the research was valid because it felt that there was no need to reach the question of whether the research was valid. The court did not conclude that the research or methodology was valid.

The Eleventh Circuit Court of Appeals observed the following with relation to the various studies:

The Baldus study analyzed the imposition of sentence in homicide cases to determine the level of disparity attributable to race in the rate of the imposition of the death sentence. In the first study, Procedural Reform Study (PRS), the results revealed no race-of-defendant effects whatsoever, and the results were unclear at that stage as to race-of-victim effects.

The second study, the Charging and
Sentencing Study (CSS), consisted of a
random stratified sample of all persons
indicted for murder from 1973 through 1979.
The study examined the cases from indictment
through sentencing. The purpose of this
study is to estimate racial effects that
were the product of the combined effects of
all decisions from the point of indictment
to the point of the final death-sentencing
decision, and to include strength of the
evidence in the cases.

The study attempted to control for all of the factors which played into a capital crime system, such as aggravating circumstances, mitigating circumstances, strength of evidence, time period of imposition of sentence, geographical areas (urban/rural), and race of defendant and victim. The data collection for these studies was exceedingly complex, involving cumbersome data collection instruments, extensive field work by multiple data collectors and sophisticated computer coding, entry and data cleaning processes.

Baldus and Woodworth completed a multitude of statistical tests on the data consisting of regression analysis, indexing factor analysis, cross tabulation, and triangulation. The result showed a 6 % racial effect systemwide for white victim, black defendant cases with an increase to 20 % in the mid-range of cases. There was no suggestion that a uniform, institutional bias existed that adversely affected defendants in white victim cases in all circumstances, or a black defendant in all cases.

The object of the Baldus study in Fulton

County, where McCleskey was convicted, was

to determine whether the sentencing pattern

disparities that were observed statewide

with respect to race of the victim and race

of defendant were pertinent to Fulton

County, and whether the evidence concerning

Fulton County shed any light on Warren

McCleskey's death sentence as an aberrant death sentence, or whether racial considerations may have played a role in the disposition of this case.

Because there were only ten cases involving police officer victims in Fulton County, statistical analysis could not be utilized effectively. Baldus conceded that it was difficult to draw any inference concerning the overall race effect in these cases because there had only been one death sentence. He concluded that based on the data there was only a possibility that a racial factor existed in McCleskey's case.

McCleskey v. Kemp, supra, 753 F.2d at 887 (emphasis in original).

Although the Eleventh Circuit Court of Appeals determined that it was not necessary to address the validity of the studies, the district court specifically concluded that the research was not valid to prove any of the allegations raised. Respondent presented a wealth of testimony challenging the accuracy of the data base as well as the statistical methodology utilized. Respondent challenged the format of some of the questionnaire items in which there was insufficient provision for accounting for numerous factors present in the case. Respondent also submitted that there were numerous unknowns in both studies present which would affect the accuracy of any statistical analysis utilized. Respondent showed that the questionnaires as utilized could not capture all nuances of every case based on the format of certain specific questions.

The Charging and Sentencing Study utilized records of the State Board of Pardons and Paroles, supplemented by information from the Bureau of Vital Statistics and some questionnaires

from lawyers and prosecutors. Information was also obtained from the State Department of Offender Rehabilitation. Emphasis was placed on the fact that there was a summary of the police investigative report prepared by parole officers utilized. The records actually show, however, that this police report appeared in only about twenty-five percent of the cases. Furthermore, the investigative summaries of the Pardons and Paroles Board were done after the conviction, thus, they did not take into account the information that was known to the decision-makers at the time any individual decision was made. Furthermore, the information available from the parole board files was summary in nature. The people gathering information had no way of knowing the prosecutor's attitude toward credibility of witnesses as well as many other subjective factors.

The district court also found, as shown by the Respondent, that some of the questionnaires were clearly miscoded.

"Because of the degree of latitude allowed the coders in drawing inferences based on the data in the file, a recoding of the same case by the same coder at a time subsequent might produce a different coding. . . Also, there would be differences in judgment among the coders." McCleskey v. Zant, supra at 357. The district court also noted the inconsistencies in the questionnaires relating to McCleskey's case and his co-defendant's cases.

Respondent also introduced evidence showing comparisons between the Procedural Reform Study and the Charging and Sentencing Study. Respondent did not attempt to show that one study or the other was correct, but simply noted that there were inconsistencies such that either one or the other of the studies had to be incorrect. There were some 361 cases appearing in both studies. Of the variables examined by Dr. Katz, there were mismatches found in the coding between the two studies in all but two of the variables. The district court noted, "Some of the mismatches were significant and occurred

within factors which were generally thought to be important in a determination of sentencing outcome." <u>Id</u>. One of the central problems with these factors is there is no way to ascertain which study contains the correct data, if either study actually does contain the correct data.

In the district court proceeding, there was much testimony about the proper method of utilizing the unknown information and the unknown items present in both studies. This was presented by Respondent to rebut Professor Baldus' claim that the information was complete and accurate in the studies. Professor Baldus indicated that unknowns were consistently recoded to have zero values in analyzing the data. Dr. Katz asserted on behalf of the Respondent that the only statistically accepted method of utilizing unknowns would be to discard any observation in which there was an unknown. As the accuracy and reliability of the data is critical in this type of study, the recoding of unknown values consistently to be zero, that is not present at all, is not a reliable procedure. This method of recoding merely assumes that if an item were unknown to the coder, then it did not exist and that the decision-maker had no information concerning this factor. This overlooks the fact that prosecutors may have information in their file that was unknown to the coders and that juries may have made assumptions from the evidence which the coder concluded represented an unknown. Although Professior Baldus testified that this coding of unknowns would not affect the outcome of his analysis, the district court speficically found that the experiments conducted did not support this conclusion. McCleskey v. Zant, supra at 359.

Another factor addressed by the Respondent which seriously affects the reliability and accuracy of the data base is the use of the "other" designation. Many questions in the questionnaires provided for a designation of "other" when the questionnaire did not specifically list the appropriate answer. New variables were not identified by Professor Baldus

to include this information in his study. Thus, this additional information was simply ignored in compiling the data base.

Another weakness shown on the questionnaire design for both studies was a direct result of the fact that many murders are committed by two or more co-perpetrators. The testimony before the district court was unclear as to the instructions given to the coders or the intent of Baldus in the coding of the co-perpetrator cases. The questionnaire items are not in sufficient detail to differentiate the role of particular defendants and the extent of the participation of each defendant in the individual aggravating circumstances. It is difficult to isolate defendants who played a minor role in the crime versus a defendant who was the prime mover or actual triggerman in the case. This could be of particular importance in cases involving fact situations like that addressed by this Court in Enmund v. Florida, 458 U.S. 782 (1982).

In examining the trustworthiness of the data base, the district court specifically found the following:

After a consideration of the foregoing, the court is of the opinion that the data base has substantial flaws and that the petitioner has failed to establish by a preponderance of the evidence that it is essentially trustworthy. As demonstrated above, there are errors in coding the questionnaire for the case sub judice. This fact alone will invalidate several important premises of petitioner's experts. Further, there are large numbers of aggravating and mitigating circumstances data about which is unknown. Also, the researchers are without knowledge concerning the decision made by prosecutors to advance cases to a penalty

trial in a significant number of instances. The court's purpose here is not to reiterate the deficiencies but to mention several of its concerns. It is a major premise of a statistical case that the data base numerically mirrors reality. If it does not in substantial degree mirror reality, any inferences empirically arrived at are untrustworthy.

McCleskey v. Zant, supra, 580 F.Supp. at 360. (Emphasis in original).

In relation to the findings by the district court, the Eleventh Circuit Court of Appeals made no findings as to to the validity of the study or the data base. Although Petitioner states on numerous occasions that the Eleventh Circuit assumed the validity of the study, the court obviously did so solely for the purposes of its analysis, but specifically did not address this claim. In making its analysis, the court stated, "we affirm the district court on the ground that, assuming the validity of the research, it would not support a decision that the Georgia law was being unconstitutionally applied, much less would it compel such a finding. . . . McCleskey v. Kemp, supra, 753 F.2d at 886. The court later again stated that the court would "assume without deciding that the Baldus study is sufficient to show what it purports to reveal as to the application of the Georgia death penalty." Id. at 895. Finally, the court again stated that "it would seem that the statistical evidence presented here, assuming its validity, confirms rather than condemns the system. Id. at 899. All of these references clearly show the court was simply assuming for the purposes of analysis and argument that the study was valid. Nowhere in its opinion did the court specifically rule on the validity of the study. Thus, this Court is left with

the factual findings made by the district court which are entitled to be reviewed under the clear erroneous standard. Therefore, Respondent would initially submit that the findings by the district court that the study itself was invalid, that the data base contained inaccuracies and the statistical methodology was not proper are sufficient to justify the denial of certiorari in this case.

0

Respondent also challenged the accuracy of the models utilized by the Petitioner in the court below. Petitioner asserts that Respondent failed to present any substitute models, but such was not the burden placed on the Respondent in this type of proceeding. Furthermore, Respondent's position thoroughout this proceeding has been that a statistical analysis of this type is simply insufficient to make determinations as to subjective issues such as intent and motivation.

All models utilized by the Petitioner assumed that the information that was available to the persons gathering the data was also available to the decision-maker at the time the decisions were made. This assumption was without support in the record. Thus, any model that was produced from this data would have to be flawed because it does not measure decisions based on the knowledge of the individual decision-maker. The district court also concluded that none of the models utilized were sufficiently predictive in terms of outcome to support an inference of discrimination. McCleskey v. Zant, supra, 580 F. Supp. at 361.

A further problem pointed out in the data is the problem of multicollinearity. Multicollinearity results when variables in an analysis are specifically correlated with one another. This creates difficulties in interpreting the coefficients of different variables. A relationship between the variables distorts the regression coefficients. A significant fact in the instant case is that white victim cases tend to be more aggravated while black cases tend to be more mitigated. Thus,

aggravating factors tend to be correlated with white victim cases while mitigating factors tend to be correlated with black victim cases. Every expert who testified, with the exception of Dr. Berk, agreed that there was substantial multicollinearity in the data. As noted by the district court, "the presence of multicollinearity substantially diminishes the weight to be accorded to the circumstantial statistical evidence of racial disparity." McCleskey v. Zant, supra, 580 F. Supp. at 364. (Emphasis in original).

Respondent submits that any analysis of these statistics in the case or the statistical results produced have to be considered in light of the context of the above concerning the data base itself as well as other problems with the methodology. Pretermitting the question of whether statistics are appropriate in such cases, Respondent submits that the data base and methodology utilized in the instant case are clearly insufficient to be useful for the purpose of proving racial discrimination.

#### B. Use Of Statistics

Respondent consistently has taken issue with the use of statistics in social science research in the instant type of cases. Respondent submits that the Eleventh Circuit Court of Appeals followed the holdings of this Court and the other circuits in its analysis of the statistical evidence. As noted by that court, "[s]tatistical analysis is useful only to show facts. In evidentiary terms, statistical studies based on correlation are circumstantial evidence. They are not direct evidence. McCleskey v. Kemp, supra, 753 F.2d at 888, citing Teamsters v. United States, 431 U.S. 324, 340 (1977). Furthermore, the usefulness of statistics in any given case depends on what is attempted to be proved by statistics. Clearly, statistics are more useful in proving disperate impact than in proving the cause of that impact. Proving certain subjective factors such as intent and motivation limit the usefulness of statistical evidence.

The Eleventh Circuit conducted a thorough discussion of the usefulness of statistical evidence and the manner in which it had been received by this Court and other courts. The court noted that certain methodology was subject to misuse and must be employed with great care and further recognized the need for additional evidence even if the statistical evidence was strong. The court concluded that "[a]s in all circumstantial evidence cases, the inferences to be drawn from the statistics are for the factfinder, but the statistics are accepted to show the circumstances." Id. at 890. The court did not decline to consider statistics but simply placed the consideration of the statistics in the proper perspective in making its analysis.

### C. Legal Analyses.

As noted previously, the Petitioner has raised two specific aspects in his claim pertaining to the application of the death penalty in Georgia. Petitioner initially relies on the cruel and unusual punishment provision of the Eighth Amendment to assert that the death penalty is applied arbitrarily and capriciously. Petitioner also challenges the application of the death penalty under the Equal Protection Clause of the Fourteenth Amendment. The district court did not make a specific analysis under the Eighth Amendment because the Petitioner had conceded before the district court that the issue was resolved adversely to the Petitioner in the Eleventh Circuit and former Fifth Circuit. Thus, the district court relied upon the prior holdings of the Fifth Circuit and the Eleventh Circuit and the concession of the Petitioner in not addressing this claim. See Smith v. Balkcom, 660 F.2d 573, 584 (5th Cir. Unit B 1981); Spinkellink v. Wainright, 578 F.2d 582 (5th Cir. 1978). The Eleventh Circuit conducted a thorough analysis of both the Eighth Amendment and the Fourteenth Amendment claims.

The Eleventh Circuit concluded that Spinkellink could not be read to automatically foreclose an Eighth Amendment

challenge. The court noted this Court's holding in Godfrey v. Georgia, 446 U.S. 420 (1980), which was based on an Eighth Amendment challenge to a death sentence imposed in the state of Georgia. The Eleventh Circuit also recognized that in an Eighth Amendment claim such as the precise one presented in the instant case, there is an evitable connection between the Eighth Amendment claim and the Fourteenth Amendment Equal Protection claim. "A successful Eighth Amendment challenge would require proof that the race factor was operating in the system in such a pervasive manner that it could fairly be said that the system was irrational, arbitrary and capricious." McCleskey v. Kemp, supra at 891. The court recognized that due process claims and cruel and unusual punishment claims do not usually focus on intent, but where racial discrimination is claimed specifically on the basis of decisions made within a particular process, "then purpose, intent and motive are a natural component of the proof that discrimination actually occured. Id. at 892.

Petitioner asserts that the holding by the Eleventh Circuit relating to the Eighth Amendment is in conflict with this Court's prior holdings. Respondent knows of no holding by this Court specifically setting forth a standard to be applied in descrimination claims of an Eighth Amendment context.

In Godfrey v. Georgia, 446 U.S. 426 (1980), this Court held "if a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty." Id. at 428. The Court referred to the necessity of obviating standardless sentencing discretion. In making the analysis, the Court referred back to the decision in Gregg v. Georgia, 428 U.S. 153 (1976). Other cases making an Eighth Amendment analysis, such as Enmund v. Florida, supra, deal with a proportionality review of the specific case at hand in relation to the facts of that case. The cases focus on the determination of whether the sentence is arbitrary and capricious.

In making a determination as to whether the sentence in the instant case is arbitrary and capricious in light of a challenge that the decision was based on race, there naturally must be a focus on the decision-makers themselves. There is no challenge that the statutory scheme itself creates any arbitrariness and capriciousness, but rather that the individuals involved in the process rely upon an impermissible factor in making the decision. Thus, whether the challenge is under the Eighth Amendment or the Fourteenth Amendment, intent and motivation of those individuals involved must, by necessity, be a focus of the Court.

This Court has long recognized that "a statute otherwise neutral on its face, must not be applied so as to invidiously discriminate on the basis of race. Washington v. Davis, 426 U.S. 229, 241 (1976), citing Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886). In making a challenge to an action that is discriminatory, however, the challenge must go further than simply identifying a disperate impact. There must be proof that the challenged action was a product of discriminatory intent. Village of Arlington Heights v. Metropolitan Housing Development Corp, 429 U.S. 252, 265 (1977); Washington v. Davis, supra at 240-242. In Village of Arlington Heights, this Court recognized that it must be established that the challenged decision was at least motivated by a descriminatory purpose. Id. at 266. In Washington v. Davis, this Court noted \*the central purpose of the equal protection clause of the Fourteenth Amendment is for prevention of official conduct descriminating on the basis of race. Our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially disporportionate impact. 1d. at 326.

This Court is also recognized that an invidious discriminatory purpose could be inferred from the totality of the relevant facts; however the Court held the following:

Nevertheless, we have not held that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another. Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution. Standing alone, it does not trigger the rule . . . that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations.

Washington v. Davis, supra at 242. This Court again reiterrated in Village of Arlington Heights, supra, that "official action will not be held unconstitutional solely because it results in a racially disporportionate impact." Id. at 165. The Court specifically held that "proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." Id.

Justice Powell of this Court has also commented on the proffer of the Baldus study and another case writing a dissent from a stay of execution:

The Baldus study, relied upon by Stephens, has not been presented to us. It was made in 1980 and apparently has been available since 1982. Although characterized by the judges of the Court of Appeals who dissented from the denial of rehearing en banc, as a "particularized statistical study" claimed to show "intentional race discrimination," no one has suggested that the study focused

on this case. A "particularized" showing would require--as I understand it -- that there was intentional race discrimination in indicting, trying and convicting Stephens, and persumably in the state appellate and state collateral review that several times followed the trial. If the Baldus study is similar to the several studies filed with us in Sullivan v. Wainright, 464 U.S. 109, 104 S.Ct. 450, 78 L.Ed.2d 210 (1983), the statistics in studies of this kind, many of which date as far back as 1948, are merely general statistical surveys that are hardly particularized with respect to any alleged "intentional" racial discrimination. Surely, no contention can be made that the entire Georgia judicial system, at all levels, operates to discriminate in all cases. Arguments to this effect may have been directed to the type of statute addressed in Furman v. Georgia, 408 U.S. 238 [92 S.Ct. 2726, 33 L.Ed.2d 346] (1972). As our subsequent cases made clear, such arguments can not be taken seriously under statutes approved in Gregg.

Stephens v. Kemp, 464 U.S. 1027, 1030 n.2 (1984) (Powell, J., dissenting).

Prom this case and other cases, the Eleventh Circuit concluded that "generalized statistical studies" would be of little use in deciding whether a particular defendant was unconstitutionally sentenced to death. "As to whether the system can survive constitutional attack, statistical studies at most are probative of how much disparity is present, but it is a legal question as to how much disparity is required before

a federal court will accept it as evidence of the constitutional flaws in the system." McCleskey v. Kemp, supra at 893. The court noted that general statistical studies of the kind submitted in the instant case do not even purport to prove that a particular defendant was discriminated against because of his race. To the extent there is a subjective or judgemental component to the discretion with which a sentence is invested, not only will no two defendants be seen identical by the sentencers, but no two sentencers will see a single case precisely the same." Id. at 894.

Under this reasoning, Respondent submits that the study in the instance case too general to support any conclusions of descrimination or arbitrariness in the application of the death sentence. Certain rational and neutral variables have not been taken into account, subjective factors have not been taken into account and a statistical study of this nature can simply not support a finding of intentional discrimination.

## D. Sufficiency of the Study Presented.

Even if generalized studies of the type presented in the instant case are considered in making determinations as to inferences of discrimination, Respondent submits that the study does not support any such conclusion. The Eleventh Circuit held that "even if the statistical results are accepted as valid, the evidence fails to challenge successfully the constitutionality of the Georgia system." McCleskey v. Kemp, 753 F.2d at 894. The court specifically held that based on this decision that it was not necessary to determine whether the district court was right or wrong in faulting the study.

Id. The court went on to conclude that any decision that the results of the study justified relief would have to deal with the district court's findings as to the validity of the study itself, which the Court declined to do based on its legal conclusions.

The court then noted that "whether a disperate impact reflects an intent to discriminate is an ultimate fact which must be reviewed under the clearly erroneous standard." <a href="Id.">Id.</a>, <a href="citing Pullman-Standard v. Swint">citing Pullman-Standard v. Swint</a>, 456 U.S. 273 (1982). Thus, the court concluded that there were two factual findings in the instant case, the first being the validity of the study itself and secondly the finding of the ultimate fact based upon the circumstantial evidence revealed by the study, if the study were deemed to be valid. The court pretermitted a review of the finding concerning the validity of the study itself and reviewed the finding of fact by the district court that the ultimate fact of intent to discriminate was not proven. The Eleventh Circuit concluded, properly, that this finding of fact was supported by the record.

This Court has defined the clearly erroneous standard, noting that a finding would be clearly erroneous "when although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed." United States v. United States Gypsum Company, 333 U.S. 364 (1948). In the instant case, the Eleventh Circuit Court of Appeals properly concluded that there was evidence to support the decision by the district court and properly concluded that after a review of the entire evidence, there was no indication that a mistake had been committed by the district court.

As noted by the Eleventh Circuit, the study did not purport to prove that the Petitioner was sentenced to death because of either his race or the race of his victim. The study only shows that under certain circumstances more blacks received the death penalty than whites. Respondent would continue to assert that Petitioner has failed to make adequate comparisons of cases such that "similar" cases are actually being compared.

The Eleventh Circuit Court of Appeals found the following in relation to its analysis of the statistics presented:

The statistics are also enlightening on the overall operation of the legitimate factors supporting the death sentence. The Baldus study revealed an essentially rational system, in which high aggravation cases were more likely to result in the death sentence than low aggravation cases. As one would expect in a rational system, factors such as torture and multiple victims greatly increased the likelihood of receiving the penalty.

There are important dimensions that the statistics cannot reveal. Baldus testified that the Georgia death penalty system is an extremely complicated process in which no single factor or group of factors determines the outcome of a given case. No single petitioner could, on the basis of these statistics alone, establish that he received the death sentence because, and only because, his victim was white. Even in the mid-range of cases, where the race-of-the-victim influence is said to be strong, legitimate factors justifying the penalty are, by the very definition of the mid-range, present in each case.

The statistics show there is a race-of-the-victim relationship with the imposition of the death sentence discernible in enough cases to be statistically significant in the system as a whole. The magnitude cannot be called determinative in any given case.

The evidence in the Baldus study seems to support the death penalty system as one operating in a rational manner. Although no single factor, or combination of factors, will irrefutably lead to the death sentence in every case, the system in operation follows the pattern the legislature intended, which the Supreme Court found constitutional in Gregg, and sorts out cases according to levels of aggravation, as gauged by legitimate factors.

McCleskey v. Kemp, supra, 753 F.2d at 896-897.

The court recognized that in a discretionary system, there was bound to be some inprecision. This Court even recognized in Gregg v. Georgia, supra, that no sentencing system would be perfect. The Eleventh Circuit concluded that the Baldus study was insufficient to support a finding that racial factors played a role in the outcome sufficient to find that the system as a whole was arbitrary and capricious.

The court went on to note that the so called race of victim effect increased in the mid-range of cases and accepted the twenty percent figure of the Petitioner in making its analysis. The court concluded, "[h]is testimony leaves this Court unpersuaded that there is a rationally classified, well-defined class of cases in which it can be demonstrated that a race-of-the-victim effect is operating with a magnitute approximating twenty percent." McCleskey v. Kemp, supra at 898. This is based on the fact that Baldus did not define the so called mid-range of cases. The court also concluded, however, that one could not focus on an undefined mid-range of cases to find that an entire system as a whole operated unconstitutionally. "It is simply not satisfactory to say that the racial effect operates in 'close cases' and therefore that the death penalty would be set aside in 'close cases.' Id.

The court concluded that the statistics alone were insufficient to show that the sentence was determined by the race of the victim or even if the race of the victim contributed to the imposition of the death penalty.

The Eleventh Circuit also focused on the fact that

Petitioner presented virtually no additional evidence to

support a conclusion that the race of the victim in any way

motivated the jury to impose the death sentence. Petitioner

has referred to the district court's denial of discovery as to

certain aspects of this case. Petitioner ignores the fact that

Petitioner sought to obtain discovery of evidence from the

Respondent in this case which was not in the custody or control

of the Respondent. The district court did not prohibit the

Petitioner from introducing any such evidence. As a matter of

fact, it was discussed during certain conferences with the

court that the Petitioner contemplated presenting such

"anecdotal" evidence and Repondent was prepared to rebut such

evidence.

#### E. Conclusion.

Respondent submits that the Eleventh Circuit properly applied the law of this Court and of this circuit in determining that no Eighth Amendment or Fourteenth Amendment violation had been shown. The court properly concluded that even if the validity of the study was assumed, which Respondent asserts that it should not be, the study simply confirms rather than condemns the system. 'The study showed no discrimination as to the race of the defendant. The marginal disparity based on the race of the victim tends to support the state's contention that the system is working far differently from the one which <u>Furman</u> condemned.' <u>Id</u>. at 899. As Petitioner has not shown sufficiently that the holding by the Eleventh Circuit Court of Appeals was in conflict with the decisions of this Court or that there has been discrepancy in the circuits, Respondent submits that no basis for the granting for

certiorari exists based on the holding by the Eleventh Circuit Court of Appeals. Therefore, Respondent would urge this Court to deny certiorari as to this issue.

# II. THERE WAS NO VIOLATION OF GIGLIO V. UNITED STATES IN THE INSTANT CASE.

In this case, the district court granted habeas corpus relief concluding that the jury was left with the impression that witness Offie Evans had been made no promises which would affect his credibility. The Eleventh Circuit Court of Appeals reversed, holding that there were no promises as contemplated by Giglio v. United States, 405 U.S. 150 (1972) and that if there had been a Giglio violation it would be harmless. Petitioner challenges this ruling by the Eleventh Circuit Court of Appeals.

At the trial of the instant case, the State presented numerous witnesses, including the co-defendant, Ben Wright, to testify concerning the circumstances of the crime. During the initial presentation of the State's case, Ben Wright testified as to various persons and their participation in the robbery and also specifically testified that the Petitioner stated that the Petitioner shot a police officer. During the rebuttal portion of the case, the State presented several witnesses, including Offie Gene Evans. Evans did not testify at any time during the trial except as a rebuttal witness. At the beginning of his testimony, the State brought out the fact that Evans was presently incarcerated in the federal penitentiary serving a six year sentence for forgery. The State also brought out the fact that Evans had been convicted in 1953 for burglary, 1955 for larceny, 1959 for carrying a concealed weapon, 1961 for burglary, 1962 for burglary and forgery and 1967 for theft.

During Evans' testimony, he stated that in July of 1978 he was incarcerated in the Fulton County jail. At that time he was charged with escape from a federal halfway house. Evans testified that the escape charge was still pending, but he hoped he would not be prosecuted. When asked by Mr. Parker,

the Assistant District Attorney, if Mr. Parker had made any promises to Evans, Evans stated he had not. Evans specifically testified that the federal authorities told him they were not going to charge him with escape.

Evans later testified that during his incarceration in Fulton County he talked with the Petitioner concerning the crime. The Petitioner told Evans that the Petitioner went and checked out the place to be robbed a few days before the crime. Evans also testified that the Petitioner told him, "but said after he [McCleskey] seen the police come in and he was heading towards the other three, what was in the court -- I mean in the place taking the robbery off, he said that he couldn't stand to see him go down there, and I think the police looked around and seen him and he said, 'halt,' or something, and he had to -- it was him or them one, and said that he had to shoot." (T. 870).

Evans also testified concerning a conversation with the Petitioner about a makeup kit and about the Petitioner being made up slightly with a makeup kit. Evans finally testified that the Petitioner told him, "It would have been the same thing if it had been a dozen of them, he would have had to try to shoot his way out." (T. 871).

On cross-examination, defense counsel emphasized Evans' criminal history and attempted to portray Evans as a professional criminal. Evans testified on cross-examination that he told the police about the conversations with the Petitioner because the deputy heard him talking. Counsel also cross-examined Evans concerning the makeup kit. Evans later testified on cross-examination that the deputy asked if Evans wanted the deputy to call homicide and would he tell them what he had been told. Evans agreed to this. Evans was then asked what he was expecting to get out of telling this to the authorities. Evans responded, "just like I had been talking to Ben and something like that." (T. 880). Defense counsel also pointed out that Evans was seeking to protect his own self

interest by testifying so that suspicion would not be thrown on him based on his acquaintance with Ben Wright. Defense counsel asked, "Now, were you attempting to get your escape charges altered or at least worked out, were you expecting your testimony to be helpful in that?" (T. 882). Evans responded, "I wasn't worried about the escape charge. I wouldn't have needed this for that charge, there wasn't no escape charge." (T. 882). Evans testified that the charges were still pending against him but that he did not want to get prosecuted for the offense.

The Petitioner called Offie Evans as a witness at the state habeas corpus proceeding. Evans testified that he had been brought to Fulton County jail in July of 1978 from the federal prison system on an escape charge. He testified that prior to the time of his testimony he talked with two Atlanta police officers named Harris and Dorsey. He said he did not remember all about the conversation he might have had with Dorsey. He also testified that he talked with Russell Parker from the Fulton County District Attorney's office prior to his testimony, and just explained to Mr. Parker the substance of his prior conversations with the Petitioner. He testified that the detective knew about the escape charges, but Evans did not tell Parker about the charges. (S.H.T. 119).

Evans testified that the federal authorities were not actually charging him for escape, but with breach of trust due to an incident in a halfway house. Evans stated that he "wasn't on the run." (S.H.T. 120). He also testifed that the charges were settled at the federal penitentiary by the committee. He testified, "I think it was in August when I went before the committee out there and they told me they were going to drop the charges." (S.H.T. 121). During further questioning, Evans testified that it was either the last part of August or around the first of September of 1978 when he was told by the officials at the federal penitentiary that they were going to drop the charges. In response to a question by

the court, Evans stated, "I wasn't promised nothing about -- I wasn't promised nothing by the D.A. but the Detective told me that he would -- he said he was going to do it himself, speak a word for me. That was what the Detective told me." (S.H.T. 122).

Assistant District Attorney Russell Parker testified for the state habeas corpus court by way of deposition. Mr. Parker testified that he did not recall Detective Dorsey having any role in developing the testimony of Evans. His only memory was that Detective Jowers, Detective Harris and Deputy Hamilton were involved. (Parker deposition at 9). He also testified that he was unaware of any understanding between Evans and any Atlanta Police Department Detective concerning any favorable recommendation as to his federal escape charge at the time of the trial. Id. Mr. Parker testified that he was not aware of any understanding, even as of the date of the deposition on February 16, 1981, that might have existed between any Atlanta Police Department Detective and Offie Evans. Mr. Parker testified that he apparently later talked to someone with the F.B.I. to discover whether or not Evans would be prosecuted and ascertained that he probably would not. He never asked anyone to drop a charge and he did not know of Offie Evans ever asking anyone to try and get charges dropped.

The state habeas corpus court determined that it could not conclude that an agreement existed "merely because of the subsequent disposition of the criminal charges against a witness for the State." (State habeas corpus order at 8). The court also relied upon the fact that any comment was at most a communication strictly between a detective and the witness which was not communicated to Mr. Parker.

In reviewing this allegation, it is essential to examine the underlying purposes behind the various doctrines utilized in this area. In Alcorta v. Texas, 355 U.S. 28 (1957), this Court examined a case in which an eyewitness which testified at trial later made a sworn statement that he gave false testimony

at trial. The witness specifically stated that he told the prosecutor about the information prior to trial, but the prosecutor told him not to volunteer any information. The prosecutor admitted being aware of this information. This Court concluded that the testimony was seriously prejudicial and that it was the only evidence available to refute the defense presented.

Subsequently, in Napue v. Illinois, 360 U.S. 264 (1959), the principal state's witness testified at trial that no promises had been made for his testimony. It later developed that the witness had been made promises and the attorney did not correct the testimony at trial. The jury was simply told that a public defender would do what he could on behalf of the witness. The Court was faced with a situation in which the State failed to correct known false testimony. This Court focused on the extremely important nature of the testimony because of the fact that the passage of time and a dim light at the scene of the crime made any eyewitness identification very difficult and some of the pertinent witnesses for the State had left the State. The court noted that the evidence presented was largely the testimony of this particular witness. The Court went on to conclude that a conviction obtained through the use of known false testimony violated the Fourteenth Amendment to the United States Constitution. This would apply in situations in which the prosecutor either solicited the testimony or allowed it to go uncorrected. The Court noted that the rule did not cease to apply merely because the testimony only went to the credibility of the witness. The Court noted that in Napue there clearly was testimony at trial that no one offered to help the witness outside of an unidentified lawyer in the public defender's office who held a considerably different position from the prosecutor who had actually made the offer.

In <u>Giglio v. United States</u>, 405 U.S. 150 (1972), this Court examined a case in which the witness in question was a

co-conspirator and was the only witness linking the defendant with the crime. The government's attorney stated that there had been no promises. In the case one assistant attorney had made a promise that if the witness testified before the grand jury and at trial he would not be prosecuted. That assistant did not try the case. The Court referred to the decision in Napue, supra and noted that when the reliability of a given witness could well be determinative of guilt or innocence, non-disclosure of evidence which would affect the credibility of that witness fell within the rule of Brady v. Maryland requiring disclosure of the information. The Court noted that the rule would not apply if the information was only possibly helpful, but not likely to have changed the verdict. Napue, supra at 269. The Court in Giglio v. United States focused on the holding of Napue that a new trial would be required if the false testimony could in any reasonable likelihood have affected the judgment of the jury. In Giglio, the Court noted that without the testimony of that witness, there would have been no indictment and no evidence to carry to the jury; therefore, a new trial was required.

In each of the cases cited, the witness in question was a key witness in the case. In Alcorta v. Texas, the witness in question gave the only evidence to refute the defense presented. In Napue v. Illinois, supra, the testimony of the witness was noted as being extremely important as the witness provided the large part of the testimony at trial and made a critical identification of the defendant as a participant in the crime. In Giglio v. Illinois, the Court noted that without the testimony of the witness in question, there very likely would have been no indictment and no evidence to carry to the jury.

Respondent submits that there has never been a factual finding that anyone made any promise to Offic Evans. The state habeas corpus court simply stated that as a matter of law, even assuming Evans was telling the truth, there was no Giglio

violation. Respondent further asserts that this mere statement that a detective would "speak a word" for him is insufficient to constitute a deal under the holdings in Napue and Giglio.

The Eleventh Circuit properly applied the holdings in Napue and Giglio in finding "the detective's promise to speak a word falls far short of the understandings reached in Giglio and Napue." McCleskey v. Kemp, supra at 884. The court went on to properly find that the statement of the detective, even if made, "offered such a marginal benefit, as indicated by Evans, that it is doubtful it would motivate a reluctant witness, or that disclosure of the statement would have had any effect on his credibility." Id. Thus, Respondent submits that the Eleventh Circuit Court of Appeals properly concluded that there was no due process violation.

In the instant case, the witness in question was not a key prosecution witness, but simply a rebuttal witness called to corroborate other testimony. The co-conspirator had already testified concerning the fact that the Petitioner stated that he shot the victim. The Petitioner did not raise a defense of lack of malice, but asserted that he did not commit the act at all. No defense was ever urged concerning a lack of malice: therefore, the testimony of this witness was not critical in this regard. Furthermore, there was other testimony from another witness that the Petitioner committed the crime in question and fired the fatal shot. Thus, there is a lack of materiality that was present in the cases of Giglio and Napue. Thus, Respondent submits that this is sufficient in itself to conclude that there was no due process violation. In considering the purpose behind Giglio and subsequent decisions, it is clear that the basis for these opinions was so the jury would know facts that might motivate a witness in giving certain testimony so that the jury might properly assess a witness' credibility. See Smith v. Kemp, 715 F.2d 1459, 1467 (11th Cir.), cert. denied, U.S. \_\_\_, 104 S.Ct. 510 (1983). The Eleventh Circuit correctly concluded that any so-called

offer by the detective was so marginal as to make it highly ulikely that it would motivate a reluctant witness in any fashion or that the disclosure this one statement would have had any effect on the credibility of the witness.

Furthermore, the Eleventh Circuit Court of Appeals properly concluded that even if there had been a violation of Giglio, supra, any such error was harmless beyond a reasonable doubt. The court properly concluded that there was no "reasonable likelihood" that this statement would have affected the judgment of the jury. McCleskey v. Kemp, supra at 884. There was substantial impeaching evidence concerning the credibility of Evans without this one minor statement. The prosecutor set forth all of Evans' prior convictions and Evans was subject to rigorous cross-examination by counsel for the Petitioner. "Evans also admitted that he was testifying to protect himself and one of McCleskey's codefendants. In light of this substantial impeachment evidence, we find it unlikely that the undisclosed information would have affected the jury's assessment of Evans' credibility." Id. Thus, it is clear that any violation of Giglio was harmless beyond a reasonable doubt.

Contrary to the assertion of the Petitioner, the testimony of Evans was not crucial. The testimony of the co-defendant, Ben Wright, was sufficiently corroborated under Georgia law without the testimony of this witness. Under Georgia law, there need not be corroboration in every material detail. See Blalock v. State, 250 Ga. 441, 298 S.E.2d 477 (1983). The testimony of Ben Wright was corroborated by Petitioner's own confession without the necessity of Evans' testimony. Any comments by Evans concerning the use of makeup and McCleskey's intent were not sufficient to conclude that it could "in any reasonable likelihood have affected the judgment of the jury." Giglio, supra, 405 U.S. at 154. The testimony by Evans was not the only evidence concerning malice presented at trial. The prosecutor argued that the physical evidence showed malicious intent, asserting that the evidence indicated the police

officer had been shot a second time as he lay dying on the floor. The prosecutor also argued that the only choice left to Petitioner was to surrender or kill the police officer and that the fact that he chose to kill indicated malice. The prosecutor finally argued that Petitioner's statement to Evans that he would have shot his way out if there had been twelve officers also showed malice. Petitioner never attempted to rebut the evidence of malice and did not present a defense of lack of malice. Thus, this evidence was still not crucial to the State's case.

Based on all of the above and foregoing, Respondent submits that the Eleventh Circuit Court of Appeals properly applied the holdings of this Court in determining that there was no due process violation, or if there were any such violation, it was harmless beyond a reasonable doubt. Therefore, this Court should decline to grant certiorari on this issue.

III. ELEVENTH CIRCUIT COURT OF APPEALS

PROPERLY CONCLUDED THAT ANY ALLEGED

BURDEN-SHIFTING CHARGE WAS HARMLESS

BEYOND A REASONABLE DOUBT.

Petitioner asserts this Court should grant certiorari to consider whether the Eleventh Circuit Court of Appeals improperly found that the charge in the instant case, if burden-shifting, was harmless beyond a reasonable doubt. The Eleventh Circuit concluded that the charge challenged was virtually identical to that found unconstitutional by that court in Franklin v. Francis, 720 F.2d 1206 (11th Cir. 1983). Which finding was affirmed by this Court in Francis v. Franklin, \_\_\_ U.S. \_\_\_, 105 S. Ct. 1965 (1985). The Eleventh Circuit Court of Appeals concluded that under its holdings, there were still two standards for ascertaining whether a burden-shifting charge could be harmless error under the standards of Chapman v. California, 386 U.S. 18 (1967). The Eleventh Circuit has found unconstitutionally burden-shifting instructions harmless when the evidence of guilt was so overwhelming that the error could not have contributed to the jury's decision to convict. Lamb v. Jernigan, 683 F.2d 1332 (11th Cir. 1982), cert. denied, 460 U.S. 1024 (1983). This was the basis for the finding of harmless error by the district court in the instant case. The Eleventh Circuit recognized that at least four members of this Court indicated that this particular test might be inappropriate in a Sandstrom analysis. Connecticut v. Johnson, 460 U.S. 73, 85-87 (1983).

The second test utilized by the Eleventh Circuit is where the instruction shifts the burden on an element that is not at issue at trial. Lamb, supra, 683 F.2d at 1342. Even the plurality in Connecticut v. Johnson indicated that this type of harmless error might be endorsed in certain limited circumstances:

[A] <u>Sandstrom</u> error may be harmless if the defendant conceded the issue of intent .... In presenting a defense such as alibi, insanity, or self-defense, a defendant may in some cases admit that the act alleged by the prosecution was intentional, thereby sufficiently reducing the likelihood that the jury applied the erroneous instruction as to permit the appellate court to consider the error harmless.

Connecticut v. Johnson, supra, 460 U.S. at 87. This is the type of analysis applied by the Eleventh Circuit in finding harmless error in the instant case.

The Eleventh Circuit concluded that Petitioner did not simply rely upon the state's urden of proving each element of the crime beyond a reasonable doubt. The Eleventh Circuit concluded the following with regard to the defense asserted by the Petitioner:

Rather, he took the stand at trial and testified that he was not a participant in the Dixie Furniture Store robbery which resulted in the killing of Officer Schlatt .... In closing argument, McCleskey's attorney again stressed his client's alibi defense. He concentrated on undermining the credibility of the eyewitness identifications that penpointed McCleskey as the triggerman and unquestioning the motives of the other robbery participants who testified that McCleskey had fired the fatal shots .... Although McCleskey's attorney's arguments were consistent with the alibi testimony offered by McCleskey himself, the jury chose to c.sbelieve that testimony and relied instead on the testimony of eyeswitnesses and other participants in the robbery.

McCleskey v. Kemp, supra, 753 F.2d at 903-904. The court thus concluded that by virtue of asserting the alibi defense, the Petitioner effectively conceded the issue of intent, although not explicitly conceding the issue of intent. The court did not conclude that a defense of alibi would automatically render a Sandstrom violation harmless, but concluded that "where the State has presented overwhelming evidence of an intentional killing and where the defendant raises a defense of non-participation in the crime rather than lack of mens rea, a Sandstrom violation on the intent instruction such as the one at issue here is harmless beyond a reasonable doubt." Id., citing Engle v. Koehler, 707 F.2d 241, 246 (6th Cir. 1983), aff'd by an equally divided court, U.S. , 104 S. Ct.

Respondent submits that this analysis by the Eleventh
Circuit falls squarely within that concluded to be permissible
by the dessenters in Connecticut v. Johnson and at least
indicated to be permissible by the plurality in Connecticut v.

Johnson. As intent was effectively not an issue in the case
for the jury to decide, it is clear that the charge was
harmless beyond a reasonable doubt. Therefore, Respondent
would urge this Court to decline to grant certiorari on this
ground.

IV. THE ELEVENTH CIRCUIT COURT OF APPEALS
PROPERLY DENIED RELIEF ON PETITIONER'S
ASSERTION THAT THE JURY WAS
IMPERMISSIBLY QUALIFIED AS TO CAPITAL
PUNISHMENT.

Petitioner has asserted that this Court should grant certiorari on the question of whether the exclusion for cause of prospective jurors based on their opposition to the death penalty at the guilt phase is impermissible Petitioner's cites to the differing holdings in <u>Grigsby v. Mabry</u>, 758 F.2d 226 (8th Cir. 1985) (en banc) and <u>Keeten v. Garrison</u>, 742 F.2d 129 (4th Cir. 1984).

The Eleventh Circuit Court of Appeals declined to grant relief on this issue holding, "because both jurors indicated they would not under any circumstances consider imposing the death penalty, they were properly excluded .... Their exclusion did not violate Petitioner's Sixth Amendment rights to an impartial community representative jury." McCleskey v. Kemp, supra, 753 F.2d at 901. The court relied upon the holdings of the former Fifth Circuit Court of Appeals in making this conclusion. Smith v. Balkcom, 660 F.2d 573, 582-83 (5th Cir. Unit B 1981), cert. denied, 459 U.S. 882 (1982); Spinkellink v. Wainwright, 578 F.2d 582, 593-94 (5th Cir. 1978), cert. denied, 440 U.S. 976 (1979).

The reasoning in <u>Spinkellink</u>, <u>supra</u>, is still applicable in the instant case. In that case, the former Fifth Circuit assumed that a death-qualified jury would be more likely to convict than a non-qualified jury for purposes of its analysis. The court then went on to note that this still did not demonstrate which jury would be impartial. The court concluded that a review of the <u>voir dire</u> examination demonstrated that the venire that had been chosen in no way indicated a bias either for the prosecution or a bias against

the defendant. "The venireman indicated only that they would be willing to perform their civic obligation as jurors and obey the law. Such persons cannot accurately be branded as prosecution-prone." Spinkellink, supra, 578 F.2d at 594. The court recognized the state also enjoyed the right to an impartial jury even as did the defendant and "impartiality requires not only freedom from jury bias against the accused and for the prosecution, but freedom from jury bias for the accused and against the prosecution." Id. at 596. The court concluded that to call a jury which had been death-qualified prosecution-prone would be to misunderstand the meaning of impartiality. Id. at 596.

The court also denied the defendant's assertion that qualifying the jury in this manner violated the Sixth Amendment's provision for a representative cross-section of the community. The court even assumed that this could be shown to be a distinctive class, but went on to find the state had "weightier reasons" as required in <a href="Taylor v. Louisianna">Taylor v. Louisianna</a>, 419 U.S. 522 (1975), for the exclusion of such veniremen.

Respondent submits that this holding by the Eleventh Circuit and former Fifth Circuit Court of Appeals clearly complies with the constitutional mandates of this Court. The so called death-qualification of the jury is simply an attempt to seat an impartial jury, that is, a jury which is neither biased for the prosecution nor for the defendant. This Court has again recently recognized the state's right to exclude jurors for cause based on their opinions as to the death penalty. "Exclusion of jurors opposed to capital punishment began with a recognition that certain of those jurors might frustrate the State's legitimate interest in administering constitutional capital sentencing schemes by not following their oaths." Wainright v. Witt, \_\_\_ U.S. \_\_\_, 105 S. Ct. 844, 851 (1985). The decisions discussing the excusal as such jurors are all focused on the concept of an impartial jury, that is, jurors who will "conscientiously apply the law and

legitimately excuse such jurors both at the sentencing phase and at the guilt-innocence phase based on the assumption that the juror's attitudes toward the death penalty could easily affect his view on guilt-innocence. Furthermore, to require the state to conduct two seperate trials, in effect, clearly exceeds constitutional mandates. In order to seat a second jury for a sentencing proceeding, as contemplated by the Eighth Circuit Court of Appeals, the State would have to retry the defendant by presenting all evidence at the second proceeding so that the second jury could be in the same position as the first jury in order to appropriately determine the sentence. Clearly, this is not constitutionally required.

Respondent therefore submits that this allegation presents no ground for review by this Court and would urge this Court to deny certiorari on this ground.

#### CONCLUSION

For all of the above and foregoing reasons, Respondent respectfully requests that this Court deny the petition for a writ of certiorari filed on behalf of the Petitioner, Warren McCleskey.

Respectfully submitted,

MICHAŁ, J. BOWERS Attorney General 071650

MARION O. GORDON 302300 First Assistant Attorney General

WILLIAM B. HILL, JR. 354725 Senior Assistant Attorney General

MARY BETH WESTMORELAND 750150
Assistant Attorney General
Counsel of Record for the Respondent

MARY BETH WESTMORELAND 132 State Judicial Building 40 Capitol Square, S. W. Atlanta, Georgia 30334 (404) 656-3349

#### CERTIFICATE OF SERVICE

I, MARY BETH WESTMORELAND, a member of the bar of the Supreme Court of the United States and counsel of record for the Respondent, hereby certify that in accordance with the rules of the Supreme Court of the United States, I have this day served a true and correct copy of this brief in opposition for Respondent upon the Petitioner by depositing copies of same in the United States mail with proper address and adequate postage to:

John Charles Boger 99 Hudson Street New York, New York 10013

Robert H. Stroup 1515 Healey Building Atlanta, Georgia 30303

Timothy K. Ford 600 Pioneer Building Seattle Washington, 98104

Anthony G. Amsterdam New York University School of Law 40 Washington Square, S. New York, New York 10012

This 28th day of June, 1985.

Mary Beth Westmone Land
Counsel of Record for Respondent



#### IN THE

# Supreme Court of the United States

OCTOBER TERM, 1984

WARREN MCCLESKEY,

Petitioner,

V.

RALPH M. KEMP,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

MOTION FOR LEAVE TO FILE BRIEF
AMICUS CURIAE AND
BRIEF AMICUS CURIAE OF THE
INTERNATIONAL HUMAN RIGHTS LAW
GROUP IN SUPPORT OF PETITION
FOR WRIT OF CERTIORARI

Of Counsel:

Amy Young, Esq.
Hurst Hannum, Esq.
Steven M. Schneebaum,
Esq.

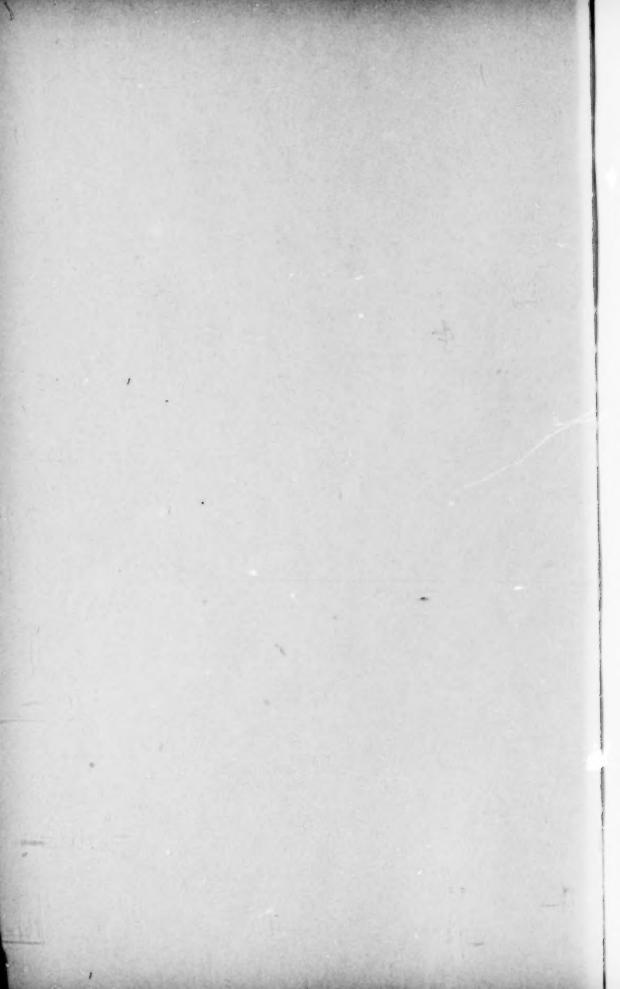
INTERNATIONAL HUMAN RIGHTS LAW GROUP Washington, D.C.

\*RALPH G. STEINHARDT, ESQ. PATTON, BOGGS & BLOW 2550 M Street, N.W. Washington, D.C. 20037 (202) 457-6055

\*Counsel of Record

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

3018



# MOTION OF THE INTERNATIONAL HUMAN RIGHTS LAW GROUP TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Pursuant to Rule 36.3 of the Rules of this Court, the International Human Rights Law Group moves for leave to file the attached brief amicus curiae in support of the petition for a writ of certiorari. The Law Group is a non-profit organization of international lawyers and scholars, which, through litigation, publication, and other public activism, seeks to promote respect for human rights norms in all nations, including the United States.

Amicus wishes to support the petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit on the grounds that that Court of Appeals has both "decided an important question of federal law which has not been, but should be settled by this Court" and "decided a federal question in a way in conflict with applicable decisions of this Court." Rule 17(c). In particular, amicus wishes to submit for this Court's consideration the argument that the en banc decision below approved an admittedly racially-discriminatory system for the imposition of the death penalty, which violates peremptory norms of international law. In failing to consider international law as a relevant source of the rule of decision, the Eleventh Circuit's decision violates the Supremacy Clause of the Constitution and applicable decisions of this Court. Alternatively the precise question of whether international human rights norms must inform interpretations of Constitutional text is a highly significant issue of federal law deserving authoritative resolution by this Court.

Amicus also brings a unique institutional perspective to these proceedings. Between 1980 and 1984, the Law Group sought to litigate the issues of race discrimination raised in this case before the Inter-American Commission on Human Rights, an instrumentality of the Organization of American States. On October 3, 1984, the Commission held the Law Group's petition inadmissible on certain procedural grounds. The Government of the United States had requested such a disposition inter alia on the ground that domestic remedies had not been exhausted and in particular on the ground that the issues raised herein were appropriate for disposition in the first instance by this Court and U.S. courts generally.

Amicus is not aware of any presentation of these arguments to this Court in this case. Counsel for petitioner has consented to the filing of this brief. Amicus sought the consent of counsel for the respondent who declined to provide it, necessitating this motion.

Respectfully submitted,

RALPH G. STEINHARDT PATTON, BOGGS & BLOW 2550 M Street, N.W. Washington, D.C. 20037 (202) 457-6000

Counsel of Record for the International Human Rights Law Group

## TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	v
INTEREST OF THE AMICUS	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
I. As Suggested By The United States In Its Submissions To The Inter-American Commission On Human Rights, The Issues Raised By The Eleventh Circuit's Decision Are Uniquely Important Questions Of Federal Law Deserving Authoritative Resolution II. The Eleventh Circuit Was Required To Construe The Georgia Death Penalty Statute Consistently With Pertinent International Law And Failed To Do So. The Existence Of Racial Discrimination As Acknowledged By The Eleventh Circuit Violates A Perempton	3
ry Norm Of International Law	
CUNCLUSION	

## TABLE OF AUTHORITIES

CASES:	Page
Asakura v. Seattle, 265 U.S. 332 (1923)	8. 10
Barcelona Traction Light and Power Co., Ltd., [1970] I.C.J. Rep. 32	9
Castaneda v. Partida, 430 U.S. 482 (1976)	_
Cook v. United States, 288 U.S. 102 (1983)	6
Eddings v. Oklahoma, 455 U.S. 104 (1993)	7
Eddings v. Oklahoma, 455 U.S. 104 (1982)	
Fernandez v. Wilkinson, 505 F. Supp. 787 (D. Kan. 1980)	7
Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980)	7
First National City Bank v. Banco Para el Commercio Exterior de Cuba, 103 S. Ct. 2591 (1983)	6
Lauritzen v. Larsen, 345 U.S. 571 (1953)	7
Legal Consequences for States of the Continued Presence of South Africa in Namibia (South Africa) notwith- standing Security Council Resolution 276, [1971] I.C.J. Rep. 57	9
McCulloch v. Sociedad Nacional de Marineros de Hon-	
duras, 372 U.S. 10 (1963)	7
Murray v. The Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804)	7
The Nereide, 13 U.S. (9 Cranch) 388, 423 (1815)	6
North Sea Continental Shelf Cases, [1969] I.C. J. Rep. 37	7
The Paquete Habana, 175 U.S. 677 (1900) 2, 6, 7	
Respublica v. DeLongchamps, 1 U.S. 119, 1 Dall, 111 (O.	
& T. Pa 1784)	7
Rodriquez-Fernandez v. Wilkinson, 654 F.2d 1382 (10th Cir. 1981)	7
Rose v. Mitchell, 443 U.S. 545 (1978)	6
Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978), cert. denied 404 U.S. 976 (1979)	
Talbot v. Seeman, 5 U.S. (1 Cranch) 1 (1801)	+
Ware v. Hylton, 3 U.S. (3 Da.) 199 (1796)	7
Weinberger v. Rossi, 456 U.S. 25 (1982)	6
Wood v. Georgia, 450 U.S. 261 (1981)	7
7700a v. Georgia, 450 U.S. 261 (1981)	3

## **Table of Authorities Continued**

Page	
Woodson v. North Carolina, 428 U.S. 280 (1976) 5	
TREATIES, STATUTES, DECLARATIONS, AND REGULATIONS:	
American Convention on Human Rights, signed Nov. 22, 1969, OAS Official Records OEA/Ser. K/XVI/i.i., Doc. 65, Rev. 1, Corr. 1 (Jan. 7, 1970) App. B	
American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States, held at Bogata, Columbia (1948), OEA/Ser. L./V/I. 4 Rev.	
(1965) App. D	,
Charter of the Organization of American States, April 30, 1948, 2 U.S.T. 2395, T.I.A.S. No. 2361, App. B	
Convention against Discrimination in Education, adopted Dec. 14, 1960, 429 U.N.T.S. 93 (UNESCO General Conference) (entered into force May 22, 1962). App. Education and App. Education against Discrimination in Education, adopted Dec. 14, 1960, 429 U.N.T.S. 93 (UNESCO General Conference)	3
Convention concerning Discrimination in Respect of Employment and Occupation, adopted June 25, 1958, 362 U.N.T.S. 31 (ILO General Conference) (entered into force June 15, 1960)	3
Convention on Human Rights and Fundamental Freedoms, adopted Nov. 4, 1950, 1950 Europ. T.S. No. 5, 213 U.N.T.S. 221	
Convention on the Prevention and Punishment of the Crime of Genocide, adopted Dec. 9, 1948, 78 U.N.T.S. (entered into force Jan. 12, 1951) App. I	В
Convention Relating to the Status of Refugees, adopted July 25, 1951, Art. 3, 189 U.N.T.S. 304 (entered into force May 23, 1953) App. 1	В
Convention Relating to the Status of Stateless Persons, Art. 3, adopted Sept. 23, 1954, 360 U.N.T.S. 117 (entered into force June 6, 1960) App. 1	В

## **Table of Authorities Continued**

Page
Declaration of Social Progress and Development, adopted Dec. 11, 1969, Arts. 1 and 2, G.A. Res. 2542, 24 U.N. GAOR, Supp. (No. 30) 49, U.N. Doc. A/7630 (1969)
Declaration on the Promotion Among Youth of the Ideals of Peace, Mutual Respect and Understanding between Peoples, adopted Dec. 7, 1965; Principles 1 and 3, G.A. Res. 2037, 20 U.N. GAOR, Supp. (No. 14) 40. U.N. Doc. A/6015 (1965) App. B
Employment on Policy Convention, adopted July 9, 1964, Art. 1(2)(c), 569 U.N.T.S. 65 (entered into force July 15, 1964) App. B
European Convention on Human Rights, 213 U.N.T.S.221 (1950)
International Covenant on Civil and Political Rights.  adopted Dec. 16, 1966, G.A. Res. 2200A, 21 U.N. GAOR, Supp. (No. 16)
International Covenant on Economic, Social And Cultural Rights, adopted Dec. 16, 1966, G.A. Res. 2200A, 21 U.N. GAOR, Supp. (No. 16) App. B
International Convention on the Elimination of All Forms of Racial Discrimination, opened for signature March 7, 1966, 660 U.N.T.S. 195
International Convention on the Supression and Punishment of the Crime of Apartheid, adopted Nov. 30, 1973, G.A. Res. 3068, 28 U.N. GAOR, Supp. (No. 30) 75, U.N. Doc. A/9233/Add. 1 (1973) App. B
OAS Charter, signed April 30, 1948, entered into force December 13, 1951, 2 U.S.T. 2394, T.I.A.S. No. 2361
Protocol to the Convention against Discrimination in Education, adopted Dec. 10, 1962, (1969) U.N.T.S. No.
9423 (Cmd. 3894) App. B

## Table of Authorities Continued

Pa	ge
U.N. Charter, signed June 26, 1945, entered into force October 24, 1945, 59 Stat. 1031, T.S. No. 993	8
United Nations Declaration on the Elimination of All Forms of Racial Discrimination, adopted Nov. 20, 1963, G.A. Res. 1904, 18 U.N. GAOR Supp. (No. 15) 35, 36, U.N. Doc. A/5515 (1963) App.	В
Universal Declaration of Human Rights, adopted Dec. 10, 1948 G.A. Res. 217, U.N. doc. A/810 (1948) App.	В
Vienna Convention on the Law of the Treaties, adopted May 22, 1969, entered into force Jan. 27, 1980	8
LEGISLATIVE MATERIALS: S. Exec. Doc. L., 92d Cong., lst Sess. (1971)	8
MISCELLANEOUS: American Law Institute, Restatement of the Foreign Relations Law of the United States (Revised), § 131 (Tentative Draft No. 1, 1980)	6
American Law Institute, Restatement of Foreign Relations Law of the United States (Revised), § 702(f) (Ten. Draft No. 6, 1985)	10
Gross, Race and Death: The Judicial Evaluation of Evidence of Discrimination in Capital Sentencing, forthcoming in 18 U.C. DAVIS L. R., No. 4	5
Henkin, International Law as Law in the United States, 82 MICH. L. REV. 1555 (1984)	7
Op. Att'y Gen. 27 (1972)	6
456 (1981)	4



#### IN THE

# Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-6811

WARREN MCCLESKEY,

Petitioner.

V.

RALPH M. KEMP,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF AMICUS CURIAE OF THE INTERNATIONAL HUMAN RIGHTS LAW GROUP IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

#### INTEREST OF THE AMICUS

The International Human Rights Law Group is a nonprofit organization of international lawyers and scholars which seeks to promote the observance of international human rights norms by providing legal assistance and information to individuals and groups on a pro bono basis; representing clients in international forums; and participating amicus curiae in U.S. litigation involving international human rights norms.

In 1980, the Law Group petitioned the Inter-American Commission on Human Rights, an instrumentality of the Organization of American States, to declare that capital sentences in the United States are imposed in a racially discriminatory manner. In particular, the Law Group argued that the death penalty is imposed disproportionately on those defendants whose victims are white and that such discrimination based upon the race of the victim was in violation of treaties to which the United States is a party. After receiving statistical evidence similar and in some cases identical to that presented below by petitioner herein, the Commission held the Law Group's petition inadmissible on procedural grounds and effectively deferred the Law Group's international claims pending an authoritative disposition of the issue by American courts. The Law Group thus has a direct institutional stake in this Court's decision to review the en banc opinion of the Eleventh Circuit Court of Appeals and to resolve the issues raised by that decision.

#### SUMMARY OF ARGUMENT

This is not an ordinary capital case. Amicus appears for the purposes of (i) demonstrating the unique and fundamental significance of this case, as acknowledged by the United States in its submissions to the Inter-American Commission on Human Rights, and (ii) arguing that the Eleventh Circuit, in violation of the Supremacy Clause of the Constitution and applicable decisions of this Court, failed to consider international law as a pertinent source of the rule of decision. Under The Paquete Habana, 175 U.S. 677 (1900) and its progeny, each of Questions Presented 1 through 5 should have been considered in light of the peremptory norm of

international law condemning racial discrimination. It is submitted in fine that the *en banc* court's failure to construe the Georgia Death Penalty Statute consistently with binding international law is reversible error.

Although the international issues raised by amicus were neither presented to the courts below nor raised in the petition for certiorari, this Court has established that it has the power to consider relevant issues raised in a case "in the interests of justice," irrespective of whether those issues were previously raised, Wood v. Georgia, 450 U.S. 261, 265, n.5 (1981), and that the exercise of that power is especially appropriate in capital cases, Eddings v. Oklahoma, 455 U.S. 104 (1982).

Amicus offers no opinion as to the circuit court's disposition of purely domestic issues of law, including its severe approach to admittedly valid statistical evidence in suits of this type.

#### ARGUMENT

I. As Suggested By The United States In Its Submissions To The Inter-American Commission On Human Rights, The Issues Raised By The Eleventh Circuit's Decision Are Uniquely Important Questions Of Federal Law Deserving Authoritative Resolution.

In his petition for *certiorari*, the petitioner portrays a myriad of important, indeed unprecedented federal issues raised by the *en banc* decision of the Eleventh Circuit. *Amicus* expresses no opinion as to these domestic issues but would demonstrate to this Court that the United States in parallel international proceedings has conceded the significance of the issues raised in this case.

On August 6, 1980, amicus submitted a petition to the Inter-American Commission on Human Rights, an instru-

mentality of the Organization of American States, alleging that the United States imposed the death penalty in a racially discriminatory manner. The various studies submitted to the Commission revealed a broad pattern of racially-based disparities in death sentencing based on the race of the victim. The evidence established that a person convicted in the State of Florida of murdering a white person was ten times more likely to receive the death penalty than one convicted of murdering a black person. In Texas, the ratio was eighteen to one. In Georgia, where this litigation arose, it was twelve to one.

The Law Group argued that domestic remedies for the redress of this discrimination were effectively exhausted when this Court denied certiorari in Spinkelink v. Wainwright, 578 F.2d 582 (5th Cir. 1978), cert. denied, 404 U.S. 976 (1979).

The United States opposed the petition almost exclusively on the ground that domestic remedies had not been exhausted with the denial of certiorari in Spinkelink. It stressed that U.S. courts including this Court remained open to receive evidence demonstrating the fact and extent of discrimination. Indeed, the government of the United States in framing the issue expressly conceded its relevance and importance:

The Petition filed by the International Human Rights Law Group on behalf of all prisoners currently awaiting execution in the states of Florida, Georgia, and Texas raises an important issue in the administration of jus-

The data are described in the affidavit of Professor William J. Bowers, which was attached to the Law Group's 1980 petition, and which is attached hereto as Appendix A. See also, Zeisel, Race Bias in the Administration of the Death Penalty: The Florida Experience, 95 HARV. L. REV. 456 (1981).

App. A at 4a.

Id. at 3a.

tice in the United States—whether capital punishment statutes determined by the U.S. Supreme Court to be constitutionally valid on their face are being implemented in a constitutional manner.

Opposition of the United States, Case 7465 (June 16, 1981) at ¶ 1. The United States repeated its assurance to the Commission that U.S. courts would respond fully and fairly to evidence establishing race discrimination. In light of this suggestion and on other procedural grounds, the Commission denied the petition on October 3, 1984, noting that the statistical evidence submitted was more appropriately directed to a domestic court in each individual case.

As a result, the propriety of review in this particular capital case is patent. At the threshold of course the petitioner's sentence of death inherently deserves this Court's most searching review.

Because sentences of death are "qualitatively different" from prison sentences, Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (opinion of Stewart, Powell, and Stevens, JJ.), this Court has gone to extraordinary measures to ensure that the prisoner sentenced to be executed is afforded process that will guarantee, as much as is humanly possible, that the sentence was not imposed out of whim, passion, prejudice, or mistake.

Eddings v. Oklahoma, 455 U.S. 104, 117-118 (1982) (O'Connor, J., concurring). But even ignoring its unique evidentiary record, the case raises an issue which the United States

<sup>&#</sup>x27;The statistical study submitted to the courts below "is based on the most comprehensive empirical record of racial patterns in the imposition of the death penalty that has ever been developed in this country, or that is likely to be developed in the foreseeable future." Gross, Race and Death: The Judicial Evaluation of Evidence of Discrimination in Capital Sentencing, forthcoming in 18 UNIV.

government itself apparently regards as fundamentally important and unresolved, i.e. whether discrimination in capital sentencing, as established by statistical proof, is constitutional. Pet. App. 43-50.

II. The Eleventh Circuit Was Required To Construe The Georgia Death Penalty Statute Consistently With Pertinent International Law And Failed To Do So. The Existence Of State-Sanctioned Racial Discrimination As Acknowledged By The Eleventh Circuit Violates A Peremptory Norm Of International Law.

It is axiomatic that international law is part of the law of the United States and, under the Supremacy Clause of the Constitution as interpreted, "must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination." The Paquete Habana, 175 U.S. 677, 700 (1900). This basic principle has been accepted from the earliest days of the Republic, Ware v. Hylton, 3 U.S. (3 Da.) 199, 281 (1796); The Nereide, 13 U.S. (9 Cranch) 388, 423 (1815), and received fresh confirmation from this Court as recently as 1983 in Justice O'Connor's opinion for the Court in First National City Bank v. Banco Para el Commercio Exterior de Cuba, 103 S.Ct. 2591, 2598 (1983).

CAL. DAVIS L. R., No. 4 (1985) (at page 1 of prepublication manuscript). Though acknowledging the validity of the study, the en banc court was sharply divided on the issue of what conclusions of law could be drawn from it, compare 753 F.2d at 886 with 753 F.2d at 907 (Johnson, Hatchett, and Clark, JJ., dissenting). The dispute independently suggests the propriety of this Court's review in light of Justice Blackmun's opinion for the Court in both Castaneda v. Partida, 430 U.S. 482 (1976) and Rose v. Mitchell, 443 U.S. 545 (1978).

See also Op. Att'y Gen. 27 (1972) ("The law of nations, although not specially adopted by the Constitution or any municipal act, is essentially a part of the law of the land"); Restatement (Revised) of the Foreign Relations Law of the United States (Tentative Draft No. 1, 1980) at § 131, Comment D ("the proposition that international law

The most fundamental application of this principle arises when courts are requested to interpret statutes enacted by Congress or the state legislatures. In all such cases, the statute "ought never to be construed to violate the law of nations, if any other possible construction remains . . . ." Weinberger v. Rossi, 456 U.S. 25, 33 (1982), quoting Murray v. The Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804). See also, Talbot v. Seeman, 5 U.S. (1 Cranch) 1, 43 (1801); Cook v. United States, 288 U.S. 102 (1983); Lauritzen v. Larsen, 345 U.S. 571, 578 (1953); McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10, 21 (1963). The "law of nations" which the courts are directed to apply includes both treaties and customary international law."

Thus, in construing the Georgia death penalty statute and petitioner's sentence thereunder, the Eleventh Circuit Court of Appeals was obliged to "ascertain[] and administer[]" international law, insofar as "questions of right" depend upon it, The Paquete Habana, supra. On such

and agreements are law in the United States is addressed mainly to the courts. They are to apply international law or agreements as if their provisions were enacted by Congress."); Henkin, International Law as Law in the United States, 82 MICH. L. REV. 1555, 1560 (1984).

"Customary international law is essentially international common law, which arises out of the practice of nations acting in a particular manner because they feel themselves legally bound to do so. This state practice may be deduced from treaties, national constitutions, declarations and resolutions of intergovernmental bodies, public pronouncements by heads of state, and empirical evidence of the extent to which the customary law rule is observed. See North Sea Continental Shelf Cases, [1969] I.C.J. Rep. 37. Customary international law is binding on all nations and creates enforceable rights and obligations for individuals. Paquete Habana, supra; Respublica v. DeLongchamps, 1 U.S. 119, 1 Dall. 111 (O.&T. Pa. 1784). See e.g., Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980); Fernandez v. Wilkinson, 505 F. Supp. 787 (D. Kan. 1980), aff'd on other grounds sub nom, Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382 (10th Cir. 1981).

grounds, this Court struck down a discriminatory ordinance which was inconsistent with the provisions of an international treaty in Asakura v. Seattle, 265 U.S. 332 (1923):

The rule of equality established by [the treaty] cannot be rendered nugatory in any part of the United States by municipal ordinances or state laws. It stands on the same footing of supremacy as do the provisions of the Constitution and laws of the United States. It operates of itself without the aid of any legislation, state or national; and it will be applied and given authoritative effect by the courts.

Id. at 341 (citations omitted).

The anti-discrimination norm of international law is no less binding than that applied in Asakura. Indeed, under any standard of proof, the right to be free from governmental discrimination on the basis of race is so universally accepted by nations as to constitute a peremptory norm of international law. It is included in such fundamental texts as the Charter of the United Nations, and the Charter of the Organization of American States, both of which are

A peremptory norm of international law is a "norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." Vienna Convention on the Law of Treaties. adopted May 22, 1969, entered into force Jan. 27, 1980. Although the Vienna Convention has been signed but not ratified by the United States, the Department of State, in submitting the convention to the Senate, stated that the convention "is already recognized as the authoritative guide to current treaty law and practice." S. Exec. Doc. L., 92d Cong., 1st Sess. (1971) at 1.

<sup>\*</sup>U.N. Charter, signed June 26, 1945, entered into force October 24, 1945, 59 Stat. 1031, T.S. No. 993, Article 55(c).

OAS Charter, signed April 30, 1948, entered into force December 13, 1951, 2 U.S.T. 2394, T.I.A.S. No. 2361, Article 3(j).

treaties ratified by the United States. Similar prohibitions are found in every comprehensive international treaty pertaining to human rights and in numerous international declarations and resolutions. <sup>10</sup>Recognizing this consistent and universal condemnation of racial discrimination, the International Court of Justice has concluded that "the principles and rules concerning the basic rights of the human person, including protection from . . . racial discrimination," constitute an international obligation of all states. Case concerning the Barcelona Traction Light and Power Co., Ltd., [1970] I.C.J. Rep. 32. See also Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276, [1971] I.C.J. Rep. 57:

[T]o establish . . . and to enforce distinctions, exclusions, restrictions, and limitations exclusively based on grounds of race, colour, descent or national or ethnic origin . . . constitutes a denial of fundamental human rights [and] is a flagrant violation of the purposes and principles of the charter.

With remarkable candor, the *en banc* Court of Appeals accepted the factual findings of petitioner's studies, *viz.* that no factors other than race could account for the marked increase in capital sentences among those defendants whose victims were white. Indeed, the court below expressly "assum[ed] the validity of the research," and "that it proves what it claims to prove." 753 F.2d at 886. The court's decision as a matter of law that this evidence established no violation of the Eighth and Fourteenth Amendments to the U.S. Constitution does not dispose of the issue whether it evinces a fundamental violation of international law. The court of

The relevant international authorities are collected in Appendix B.

appeals cannot so blithly ignore the legal consequences of its factual concessions.

The discrepancy in capital sentencing patterns which is assumed by the *en banc* court in this case clearly falls within the international prohibition. That norm, apparently unlike the Eighth and Fourteenth Amendments in the Eleventh Circuit, admits no defense of degree and demands no incontrovertible showing of individualized intent. It is systematic racial discrimination, of the kind admittedly demonstrated in this case, which violates binding international law.

But the en banc court below made no attempt to discharge its burden under The Paquete Habana and Asakura to apply international law. It utterly failed to address the relevant norms of international law that constitute part of federal common law. The court simply did not discuss whether the racial discrimination alleged by petitioner falls within the scope of international law as incorporated into federal common law. Instead, on the issue of discrimination. the court of appeals contented itself with considering only the contours of the Eighth and Fourteenth Amendments. The court's apparent neglect of the peremptory norm of international law prohibiting racial discrimination cannot be squared with this Court's consistent adherence to the law of nations as providing the rule of decision, whenever a litigant's rights are framed in its terms. In short, the en banc court's failure to assess the international law issues raised by its assumption that the showing of discrimination was valid constitutes error which should be reviewed by this Court. And, if the en banc court somehow did not err in failing to ascertain and apply international law, then the

<sup>&</sup>lt;sup>11</sup>See e.g. American Law Institute, Restatement of Foreign Relations Law of the United States (Revised), § 702(f) (Tent. Draft No. 6 1985).

case raises the fundamental issue of when, under *The Paquete Habana* and *Asakura*, domestic courts are obliged to look to that source of law and when they may ignore it.

## CONCLUSION

The decision of the Court of Appeals en banc that the Georgia death penalty statute is not unlawfully applied in spite of an admitted discriminatory impact flies in the face of the universal principle that international human rights law applies to all individuals. The en banc court's failure to consider in a meaningful way the international law issues relevant to this case violates the Supremacy Clause of the Constitution as interpreted and ignores the decisions of this Court which establish the fundamental role of international law in United States law. In addition, even if the en banc court's disposition were consistent with Supreme Court precedent in the international law field, the case raises issues of law and fact which sharply distinguish it from other capital cases, as the United States itself has acknowledged.

For these reasons, amicus respectfully urges this Court to grant certiorari.

Respectfully submitted,

RALPH G. STEINHARDT, Esq. PATTON, BOGGS & BLOW 2550 M Street, N.W. Washington, D.C. 20037 (202) 457-6055

Of Counsel:

Counsel of Record for Amicus Curiae

Hurst Hannum, Esq.
Amy Young, Esq.
Steven M. Schneebaum, Esq.





# APPENDIX A

# AFFIDAVIT OF PROFESSOR WILLIAM BOWERS

I am a sociologist with particular training in statistics and computer applications to sociology. I graduated from Washington and Lee University in 1957 and received my doctorate in sociology in 1966 from Columbia University. I am presently a professor of sociology at Northeastern University, Boston, Massachusetts, and Director of that University's Center for Applied Social Research.

Since approximately 1972, I have been engaged in research, study, and writing on the use of the death penalty in the United States. I am the author of numerous articles on the subject and of the book *Executions in America*, published in 1974.

Together with the Assistant Director here at the Center, Glenn L. Pierce, and others, I have supplied the figures and statistics on race-victim death sentencing disparaties contained in appendices A and B of this complaint. These figures are accurate to the best of our abilities and reflect sustained research and the use of widely-accepted statistical methods.

I believe, on the basis of my research and analysis, that the broad pattern of race-victim death sentencing disparities complained of in the foregoing document remain unremedied by state or federal authorities and therefore continue today.

# (signed) William Bowers

Professor William Bowers

SS: Commonwealth of Massachusetts County of Suffolk

Subscribed and sworn to before me this 11th day of April, 1980.

(signed) Philip C. Boyd

Notary Public

My Commission Expires: Nov. 28, 1980

SEAL

#### FLORIDA

PROBABILITY OF RECEIVING THE DEATH
SENTENCE FOR CRIMINAL HOMICIDE BY RACE
OF OFFENDER AND VICTIM IN FLORIDA FROM
THE EFFECTIVE DATE OF THE POST-FURMAN
STATUTE THROUGH 1977

	Estimated Number of	Persons Sentenced	Probability of a Death
Race of Offender	Offenders"	to Death	Sentence
White	2265	72	.032
Black	2606	61	.023
Race of Victim			
White	2439	122	.050
Black	2432	11	.005
Offender/Victim			
Racial Combinations			
Black Kills White	286	48	.168
White Kills White	2146	72	.034
Black Kills Black	2320	11	.005
White Kills Black	111	0 .	.000
All Offenders	4871	133	.027

Data Sources: (1) Supplementary Homicide Reports on criminal homicide data from January 1973 through December 1976, supplied by the Uniform Crime Reporting Program, Federal Bureau of Investigation, United States Department of Justice, Washington, D.C.; (2) Supplementary Homicide Reports on criminal homicide data for 1977, supplied by the Uniform Crime Reports Program, Department of Law Enforcement, Tallahassee, Florida; (3) persons sentenced to death from January 1973 through December 1977, supplied by Citizens Against the Death Penalty, Jacksonville, Florida.

The estimated number of offenders for a given category is obtained by multiplying the reported number of offenders in that category for the years 1976, 1977 (sources: 1, 2) by victim-based adjustment factor to correct for undercoverage. The adjustment factor 3.484 equals the number of homicide victims from January 1973 through December 1977 (sources: 1, 2) divided by the number of homicide victims in the years 1976, 1977 (sources: 1, 2).

#### **GEORGIA**

PROBABILITY OF RECEIVING THE DEATH
SENTENCE FOR CRIMINAL HOMICIDE BY RACE
OF OFFENDER AND VICTIM IN GEORGIA FROM
THE EFFECTIVE DATE OF THE POST-FURMAN
STATUTE THROUGH 1977

).	Estimated Number of	Persons Sentenced	Probability of a Death
Race of Offender	Offendersa	to Death	Sentence
White	1082	41	.038
Black	2716	49	.018
Race of Victim			
White	1265	76	.060
Black	2529	14	.005
Offender/Victim			
Racial Combinations	8		
Black Kills White	258	37	.143
White Kills White	1006	39	.039
Black Kills Black	2458	12	.005
White Kills Black	71	2.	.028
All Offenders	3798	90	.024

Data Sources: (1) Supplementary Homicide Reports on criminal homicide data from April 1973 through December 1976, supplied by the Uniform Crime Reporting Program, Federal Bureau of Investigation, United States Department of Justice, Washington, D.C.; (2) Supplementary Homicide Reports on criminal homicide data for 1977, supplied by the Criminal Activity Reporting Unit, Georgia Bureau of Investigation, Georgia Crime Information Center, Atlanta, Georgia; (3) Vital Statistics tabulations on willful homicides from April 1973 through December 1977, supplied by the Office of Health Services Research and Statistics, Division of Physical Health, Atlanta, Georgia; (4) Persons sentenced to death from April 1975 through December 1977, supplied by Georgia Committee Against the Death Penalty, Atlanta, Georgia.

The estimated number of offenders for a given category is obtained by multiplying the reported number of offenders in that category for the years 1976, 1977 (sources: 1, 2) by a victim-based adjustment factor to correct for undercoverage. The adjustment factor 4.453 equals the number of homicide victims from April 1973 through December 1977 (source: 3) divided by the number of homicide victims in the years 1976, 1977 (sources: 1, 2).

TEXAS

# PROBABILITY OF RECEIVING THE DEATH SENTENCE FOR CRIMINAL HOMICIDE BY RACE OF OFFENDER AND VICTIM IN TEXAS FROM THE EFFECTIVE DATE OF THE POST-FURMAN STATUTE THROUGH 1977

	Estimated Number of	Persons Sentenced	Probability of a Death
Race of Offender	Offenders <sup>a</sup>	to Death	Sentence
White	3771	38	.010
Black	2940	29	.010
Race of Victim			
White	3964	71	.018
Black	2740	2	.001
Offender/Victim			
Racial Combinations	3		
Black Kills White	344	27	.078
White Kills White	3616	37	.010
Black Kills Black	2597	2	.007
White Kills Black	143	0	.000
All Offenders	6711	73	.011

Data Sources: (1) Supplementary Homicide Reports on criminal homicide data from January 1974 through December 1976, supplied by the Uniform Crime Reporting Program. Federal Bureau of Investigation. United States Department of Justice, Washington, D.C.: (2) Supplementary Homicide Reports on criminal homicide data for 1977, supplied by the Uniform Crime Reporting Bureau, Texas Department of Public Safety, Austin, Texas: (3) Vital Statistics records on willful homicides from January 1974 through December 1977, supplied by the Bureau of Vital Statistics. Texas Department of Health, Austin, Texas: (4) persons sentenced to death from January 1974 through December 1977, supplied by the Office of Court Administration. The Supreme Court of Texas, Austin, Texas.

The estimated number of offenders for a given category is obtained by multiplying the reported number of offenders in that category for the years, 1976, 1977 (sources: 1, 2) by a victim-based adjustment factor to correct for undercoverage. The adjustment factor 2.473 equals the number of homicide victims from January 1974 through December 1977 (source: 3) divided by the number of homicide victims in the years 1976, 1977 (sources: 1, 2).

# FLORIDA

PROBABILITY OF RECEIVING THE DEATH
SENTENCE FOR FELONY TYPE MURDER BY RACE
OF OFFENDER AND VICTIM IN FLORIDA FROM
THE EFFECTIVE DATE OF THE POST-FURMAN
STATUTE THROUGH 1977

	Estimated Number of	Persons Sentenced	Probability of a Death
Race of Offender	Offenders <sup>a</sup>	to Death .	Sentence
White	307	54	.176
Black	251	50	.199
Race of Victim			-
White	432	97	.224 -
Black	122	7	.057
Offender/Victim			
Racial Combinations	3		
Black Kills White	136	41	.301
White Kills White	296	54	.182
Black Kills Black	115	7	.061
White Kills Black	7	0	.000
All Offenders	558	104	.186

Data Sources: (1) Supplementary Homicide Reports on criminal homicide data from January 1973 through December 1976, supplied by the Uniform Crime Reporting Program, Federal Bureau of Investigation, United States Department of Justice, Washington, D.C.; (2) Supplementary Homicide Reports on criminal homicide data for 1977, supplied by the Uniform Crime Reports Program, Department of Law Enforcement, Tallahassee, Florida; (3) persons sentenced to death from January 1973 through December 1977, supplied by Citizens Against the Death Penalty, Jacksonville, Florida.

<sup>&</sup>quot;The estimated number of offenders for a given category is obtained by multiplying the reported number of offenders in that category for the years 1976, 1977 (sources: 1, 2) by victim-based adjustment factor to correct for undercoverage. The adjustment factor 3.484 equals the number of homicide victims from January 1973 through December 1977 (sources: 1, 2) divided by the number of homicide victims in the years 1976, 1977 (sources: 1, 2).

#### GEORGIA

# PROBABILITY OF RECEIVING THE DEATH SENTENCE FOR FELONY-TYPE MURDER BY RACE OF OFFENDER AND VICTIM IN GEORGIA FROM THE EFFECTIVE DATE OF THE POST-FURMAN STATUTE THROUGH 1977

Race of Offender White Black	Estimated	Persons	Probability
	Number of	Sentenced	of a Death
	Offenders"	to Death	Sentence
	196	37	.189
	338	42	.124
Race of Victim White Black	316	69	.218
	218	10	.046
Offender/Victim Racial Combinations Black Kills White White Kills White Black Kills Black White Kills Black	134	34	.254
	183	35	.191
	205	8	.039
	13	2	.154
All Offenders	534	79	.148

Data Sources: (1) Supplementary Homicide Reports on criminal homicide data from April 1973 through December 1976, supplied by the Uniform Crime Reporting Program. Federal Bureau of Investigation, United States Department of Justice, Washington, D.C.: (2) Supplementary Homicide Reports on criminal homicide data for 1977, supplied by the Criminal Activity Reporting Unit, Georgia Bureau of Investigation, Georgia Crime Information Center, Atlanta, Georgia; (3) Vital Statistics tabulations on willful homicides from April 1973 through December 1977, supplied by the Office of Health Services Research and Statistics, Division of Physical Health, Atlanta, Georgia; (4) Persons sentenced to death from April 1973 through December 1977, supplied by Georgia Committee Against the Death Penalty, Atlanta, Georgia; (4) Persons sentenced to death from April 1973 through December 1977, supplied by Georgia Committee Against the Death Penalty, Atlanta, Georgia.

The estimated number of offenders for a given category is obtained by multiplying the reported number of offenders in that category for the years 1976, 1977 (sources: 1, 2) by a victim-based adjustment factor to correct for undercoverage. The adjustment factor 4.453 equals the number of homicide victims from April 1973 through December 1977 (source: 3) divided by the number of homicide victims in the years 1976, 1977 (sources: 1, 2).

### TEXAS

# PROBABILITY OF RECEIVING THE DEATH SENTENCE FOR FELONY-TYPE MURDER BY RACE OF OFFENDER AND VICTIM IN TEXAS FROM THE EFFECTIVE DATE OF THE POST-FURMAN STATUTE THROUGH 1977

Page of Offender	Estimated Number of Offenders	Persons Sentenced to Death	Probability of a Death Sentence
Race of Offender White	411	34	.083
Black	294	27	.092
Race of Victim			
White	551	63	.114
Black	151	2	.013
Offender/Victim Racial Combinations			
Black Kills White	173	25	.144
White Kills White	378	34	.090
Black Kills Black	121	2	.016
White Kills Black	30	0	.000
All Offenders	705	61	.087

Data Sources: (1) Supplementary Homicide Reports on criminal homicide data from January 1974 through December 1976, supplied by the Uniform Crime Reporting Program, Federal Bureau of Investigation, United States Department of Justice, Washington, D.C.; (2) Supplementary Homicide Reports on criminal homicide data for 1977, supplied by the Uniform Crime Reporting Bureau, Texas Department of Public Safety, Austin, Texas: (3) Vital Statistics records on willful homicides from January 1974 through December 1977, supplied by the Bureau of Vital Statistics, Texas Department of Health, Austin, Texas; (4) persons sentenced to death from January 1974 through December 1977, supplied by the Office of Court Administration, The Supreme Court of Texas, Austin, Texas.

The estimated number of offenders for a given category is obtained by multiplying the reported number of offenders in that category for the years 1976, 1977 (sources: 1, 2) by a victim-based adjustment factor to correct for undercoverage. The adjustment factor 2.473 equals the number of homicide victims from January 1974 through December 1977 (source: 3) divided by the number of homicide victims in the years 1976, 1977 (sources: 1, 2).

## APPENDIX B

Universal Declaration of Human Rights, adopted Dec. 10, 1948 G.A. Res. 217, U.N. doc. A/810 (1948) arts. 2, 7, 14;

International Covenant on Civil and Political Rights, adopted Dec. 16, 1966, G.A. Res. 2200A, 21 U.N. GAOR, Supp. (No. 16) arts. 2(a), 13, 26;

International Covenant on Economic, Social And Cultural Rights, adopted Dec. 16, 1966, G.A. Res. 2200A, 21 U.N. GAOR, Supp. (No. 16) art. 2(2);

Charter of the Organization of American States, April 30, 1948, 2 U.S.T. 2395, T.I.A.S. No. 2361, art. 3(j);

American Declaration of the Rights and Duties of Man. O.A.S. Res. XXX, adopted by the Ninth International Conference of American States, held at Bogota, Columbia (1948), OEA/Ser. L./V/I. 4 Rev. (1965) Arts. II, XXCII;

American Convention on Human Rights, signed Nov. 22, 1969, OAS Official Records OEA/Ser. K/XVI/i.i, Doc. 65, Rev. 1, Corr. 1 (Jan. 7, 1970) arts. 22(7), 22(9), 24;

European Convention on Human Rights, 213 U.N.T.S. 221 (1950) arts. 5, 14;

International Convention on the Suppression and Punishment of the Crime of Apartheid, adopted Nov. 30, 1973, G.A. Res. 3068, 28 U.N. GAOR, Supp. (No. 30) 75, U.N. Doc. A/9233/Add. 1 (1973);

United Nations Declaration on the Elimination of All Forms of Racial Discrimination, adopted Nov. 20, 1963, G.A. Res. 1904, 18 U.N. GAOR Supp. (No. 15) 35, 36, U.N. Doc. A/5515 (1963) art. 1;

International Convention on the Elimination of All Forms of Racial Discrimination, opened for signature March 7, 1966, 660 U.N.T.S. 195, arts. 1, 2;

Declaration of Social Progress and Development, adopted Dec. 11, 1969, Arts. 1 and 2, G.A. Res. 2542, 24 U.N. GAOR, Supp. (No. 30) 49, U.N. Doc. A/7630 (1969);

Declaration on the Promotion Among Youth of the Ideals of Peace, Mutual Respect and Understanding between Peoples, adopted Dec. 7, 1965; Principles 1 and 3, G.A. Res. 2037, 20 U.N. GAOR, Supp. (No. 14) 40, U.N. Doc. A/6015 (1965);

Employment Policy Convention, adopted July 9, 1964, Art. 1(2)(c), 569 U.N.T.S. 65 (entered into force July 15, 1964);

Protocol to the Convention against Discrimination in Education, adopted Dec. 10, 1962, [1969] U.N.T.S. No. 9423 (Cmd. 3894);

Convention against Discrimination in Education, adopted Dec. 14, 1960, 429 U.N.T.S. 93, 96 (UNESCO General Conference) (entered into force May 22, 1962);

Declaration on the Rights of the Child, Principle 1, adopted Nov. 20, 1959, G.A. Res. 1386, 14 U.N. GAOR, Supp. (No. 16) 19, U.N. Doc. A/4354 (1959);

Convention concerning Discrimination in Respect of Employment and Occupation, adopted June 25, 1958, 362 U.N.T.S. 31 (ILO General Conference) (entered into force June 15, 1960);

Convention Relating to the Status of Stateless Persons, Art. 3, adopted Sept. 23, 1954, 360 U.N.T.S. 117 (entered into force June 6, 1960);

Convention on Human Rights and Fundamental Freedoms, adopted Nov. 4, 1950, 1950 Europ. T.S. No. 5, 213 U.N.T.S. 221;

Convention Relating to the Status of Refugees, adopted July 25, 1951, Art. 3, 189 U.N.T.S. 304 (entered into force May 23, 1953);

Convention on the Prevention and Punishment of the Crime of Genocide, adopted Dec. 9, 1948, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951).

Grice - Supreme Court, U.S. FILED

JUN 28 1985

IN THE

# ALEXANDER L STEVAS Supreme Court of the United State

October Term, 1984

# WARREN McCLESKEY,

Petitioner,

against

RALPH M. KEMP, Superintendent, Georgia Diagnostic & Classification Center,

Respondent.

On Petition For Writ of Certiorari To The United States Court of Appeals For The Eleventh Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AMICUS CURIAE AND BRIEF FOR CONGRESSIONAL BLACK CAUCUS IN SUPPORT OF THE PETITION FOR CERTIORARI

> HON. JOHN CONYERS, JR. 2313 Rayburn House Office Bldg. Washington, D. C. 20515

> > \*SETH P. WAXMAN 2555 M Street, N.W. Suite 500 Washington, D. C. 20037

Attorneys for Amicus Curiae

\* Attorney of Record



# TABLE OF CONTENTS

	Page
Table of Authorities	ii
Motion For Leave To File Brief Amicus Curiae	iv
Summary of Argument	1
Argument	
Neither The Eighth Amendment Nor The Equal Protection Clause Of The Fourteenth Amendment Allow Courts Or Juries Sys- tematically To Punish Black Defendants, Or Those Whose Victims Are White, More Severely For Similar Crimes Than White Defendants, Or Those Victims Are Blacks	3
Conclusion	10

# TABLE OF AUTHORITIES

		Pag	je
	Georgia, 345 U.S. 53)		7
	v. LaHue, 460 U.S. 83)		6
	. Texas, 177 U.S. (		6
	a v. Partida, 430 (		9
	. Georgia, 408 U.S.		6
Ass'	Building Contracto 'n, Inc. v. Pennsyl U.S. 375 (1982)	lvania,	6
Unit	d School District voted States, 433 U.S	. 299	9
	. Virginia, 388 U.S 67)		6
(11t	y v. Kemp, 753 F.2d th Cir. 1985)(en c)		. 8
	. Alabama, 294 U.S.		6
	Mitchell, 443 U.S. 79)		7
	v. West Virginia,	100 U.S.	6

	Page
Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981)	9
Turner v. Fouche, 396 U.S. 346 (1970)	7
Yick Wo v. Hopkins, 118 U.S. 356 (1886)	6
Zant v. Stephens, 462 U.S. 862 (1983)	viii



#### IN THE

# SUPREME COURT OF THE UNITED STATES October Term, 1984

WARREN McCLESKEY,

Petitioner,

### - against -

RALPH M. KEMP, Superintendent, Georgia Diagnostic & Classification Center,

Respondent.

On Petition For Writ of Certiorari
To The United States Court of Appeals
For The Eleventh Circuit

# MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The Congressional Black Caucus respectfully moves this Court, pursuant to

Rule 36.1 of its Rules, for leave to file the attached brief amicus curiae in support of Warren McCleskey's petition for certiorari in this case. The consent of the petitioner has been obtained. Counsel for respondent, however, has declined our request for consent, necessitating this motion.

The Congressional Black Caucus ("the Caucus") is composed of all 20 black members of the United States House of Representatives. The primary function of the Caucus is to implement and preserve the constitutional guarantee of equal justice under the law for all Americans, particularly black Americans.

The Caucus requests leave to file a brief amicus curiae to make plain the troubling constitutional implications it finds in the opinion of the Court of Appeals, and the consequent importance to black citizens of the issues raised by the McCleskey v. Kemp case.

warren McCleskey has presented substantial evidence that racial discrimination is at work in the capital punishment statutes of the State of Georgia. His claims, based primarily on the comprehensive studies of Professor David Baldus, are well-documented, and the State's contrary evidence appears insubstantial and unpersuasive.

We come before this Court, however, not to debate the merits of McCleskey's evidence, for the Court of Appeals itself did not decide against McCleskey by dismissing his factual case. Instead, it

explicitly accepted, for purposes of the appeal, the validity of the Baldus study, and assumed that McCleskey v. Kemp, 753 F.2d 877, 886 (11th Cir. 1985)(en banc) "proves what it claims to prove." Id. Even so, the Court of Appeals reasoned that petitioner has stated no claim under the Eighth or Fourteenth Amendments.

It is this extraordinary constitutional ruling that prompts our intervention as <u>amicus curiae</u>. Even while
acknowledging substantial disparities by
race in Georgia's death sentencing rates
-- approaching twenty percentage points in
the midrange of homicide cases -- and an
overall average racial disparity exceeding
six percentage points, the Court of
Appeals holds that Eighth and Fourteenth
Amendments are unaffected.

If this troubling opinion goes unreviewed, fundamental constitutional issues long ago settled in this nation will once again be open to serious question. It is cause enough for grave concern if the pattern of executions now being carried out in this country is infected by racial discrimination. Yet if a federal court may announce that such discrimination makes no legal difference, if it holds that such a pattern affronts no constitutional principles, the time has come, the Caucus believes, for this Court to be heard.

As the ultimate guardian of our constitutional values, this Court cannot afford to overlook a pronouncement, by a majority of the United States Court of Appeals for the Eleventh Circuit sitting en banc, that appears to condone some measure of racial discrimination in capital sentencing. This Court has noted that "Georgia may not attach the 'aggra-

vating' label to factors that are constitutionally impermissible or totally irrelevant to the sentencing process, such as ... race." Zant v. Stephens (II) 462 U.S. 862, 885 (1983). Yet the McCleskey opinion threatens to give de facto sanction to just such a practice. The Caucus, one of whose principal aims is to ensure that equal justice under law remains a reality for all citizens, respectfully requests leave to file this brief amicus amicus to address these important issues.

Dated: June 28, 1985

Respectfully submitted,

HON. JOHN CONYERS, JR. 2313 Rayburn House Office Bldg. Washington, D.C. 20515

\*SETH P. WAXMAN
2555 M Street, N.W.
Suite 500
Washington, D.C. 20037

ATTORNEYS FOR AMICUS CURIAE

ву:

<sup>\*</sup>Attorney of Record

#### IN THE

# SUPREME COURT OF THE UNITED STATES October Term, 1984

WARREN McCLESKEY,

Petitioner,

- against -

RALPH M. KEMP, Superintendent, Georgia Diagnostic & Classification Center,

Respondent.

On Petition For Writ of Certiorari
To The United States Court of Appeals
For The Eleventh Circuit

BRIEF AMICUS CURIAE OF THE BLACK LEGISLATIVE CAUCUS

# SUMMARY OF ARGUMENT

The Court of Appeals, for purpose of Warren McCleskey's appeal, has accepted the validity of his statistical evidence

demonstrating (i) that black defendants, or those whose victims are white, are substantially more likely to receive death sentences in the State of Georgia than are white defendants, or those whose victims are black; and (ii) that these record disparities are not explained by any of over 230 other legitimate sentencing factors. Despite this overwhelming proof that race plays a part Georgia's capital sentencing system, the Court of Appeals had held that neither the Eighth nor the Fourteenth Amendments are implicated, apparently because it finds the magnitude of the racial influence to be relatively minor. Viewed as a statement of legal principle, this opinion by the Court of Appeals is astonishing; it turns its back on a consistent, hundred-year history of interpretation of the Equal Protection Clause. Viewed as a statement of fact, the opinion is equally deficient. It

misunderstands the true magnitude and importance of the statistical results reported in the Baldus studies. Under any analysis, the opinion deserves review by this Court.

# ARGUMENT

NEITHER THE EIGHTH AMENDMENT NOR THE EQUAL PROTECTION CLAUSE OF THE FOUR-TEENTH AMENDMENT ALLOW COURTS OR JURIES SYSTEMATICALLY TO PUNISH BLACK DEFENDANTS, OR THOSE WHOSE VICTIMS ARE WHITE, MORE SEVERELY FOR SIMILAR CRIMES THAN WHITE DEFENDANTS, OR THOSE WHOSE VICTIMS ARE BLACK

The Baldus studies examine the disposition by Georgia's criminal justice system of a wide range of homicides committed over a seven-year period from 1973 through 1979. Baldus and his colleagues collected data from official state files on over 500 items of information for each case, providing a comprehensive picture of the crimes, the defense

dants, the victims, and the strength of the State's evidence. After employing a variety of accepted social scientific methods to analyze his data -- each of which the Court of Appeals assumed to be valid for purposes of McCleskey's appeal -- Baldus reported that "systematic and substantial disparities exist in the penalties imposed upon homicide defendants in the State of Georgia based upon the race of the homicide victim," (Fed. Hab. Tr. 726-27) (Professor Baldus), and to a slightly lesser extent, "upon the race of the defendant." (Id.) Baldus found no "legitimate factors not controlled for in [his] analyses which could plausibly explain the persistence of these racial disparities." (Id. 728).

In short, the Baldus studies conclude that race continues to play a real, systematic role in determining who will receive life sentences and who will be executed in the State of Georgia. By assuming the truth of those conclusions, the Court of Appeals has sharply focused the underlying constitutional issue on this appeal: does proven racial discrimination in capital sentencing violate the Eighth or Fourteenth Amendments. The astonishing answer of the Court of Appeals is that it does not.

The Court does take issue with the Baldus studies on the exact magnitude of the racial effect -- whether it is nearer six percentage points or twenty points.

See McCleskey v. Kemp, 753 F.2d 877, 896-98 (11th Cir. 1985)(en banc). That question, however, seems plainly beside the point. The Black Caucus has long understood that unequal enforcement of criminal statutes based upon racial considerations violates the Fourteenth Amendment. Such distinctions, whatever their magnitude, have "no legitimate

overriding purpose independent of invidious racial discrimination ... [justifying]
the classification," Loving v. Virginia,
388 U.S. 1, 11 (1967); Yick Wo v. Hopkins,
118 U.S. 356 (1886); cf. Furman v. Georgia, 408 U.S. 238, 389 n.12 (Burger, C.J.,
dissenting).

One of the chief aims of the Equal Protection Clause was to eliminate of discrimination against black defendants and black victims of crime. See General Building Contractors Ass'n, Inc. v. Pennsylvania, 458 U.S. 375, 382-91 (1982); Briscoe v. LaHue, 460 U.S. 325, 337-40 (1983). Indeed, for well over 100 years, this Court has consistently interpreted the Equal Protection Clause to prohibit racial discrimination in the administration of the criminal justice system. See, e.g., Strauder v. West Virginia, 100 U.S. 303 (1880); Carter v. Texas, 177 U.S. 442 (1900); Norris v. Alabama, 294 U.S. 587

(1935); Avery v. Georgia, 345 U.S. 559 (1953); Turner v. Fouche, 396 U.S. 346 (1970); Rose v. Mitchell, 443 U.S. 545 (1979). While questions concerning the necessary quantum of proof have occasionally proven perplexing, no federal court until now has ever, to our knowledge, seriously suggested that racial discrimination at any level of magnitude, if clearly proven, can be constitutionally tolerated. Yet that is precisely the holding of the Court of Appeals.

Moreover, even if the magnitude of discrimination were a relevant constitutional consideration, Warren McCleskey's evidence has demonstrated an extraordinary racial effect. The increased likelihood of a death sentence if the homicide victim is white, for example, is .06, or six percentage points, holding all other factors constant. Since the average death-sentence rate among Georgia cases is

only .05, the fact that a homicide victim is white, rather than black, increases the average likelihood of a death sentence by 120%, from .05 to .11. The suggestion of the Court of Appeals that race affects at most a "small percentage of the cases,"

McCleskey v. Kemp, supra, 753 F.2d at 899, scarcely does justice to these figures.

In plainest terms, these percentages suggest that, among every 100 homicides cases in Georgia, 5 would receive a death sentence if race were not a factor; in reality, where white victims are involved, 11 out of 100 do. Six defendants are sentenced to death with no independent explanation other than the race of their victims.

Furthermore, the racial disparities are far more egregious among those cases where death sentences are most frequently imposed. Baldus' studies demonstrate that, among the midrange of cases, the

percentage point impact in addition to every other factor considered. Such results simply are intolerable under our Constitution, especially when the stakes are life and death.

We are tempted to believe that the Court of Appeals' opinion reflects, in part, less a conscious decision to tolerate racial discrimination than a sense that the Baldus studies are not sufficiently reliable. However, accepted at face value as the Court announces it has done, the Baldus studies account for over 230 non-racial variables, and far exceed any reasonable prima facie standard of proof ever announced by this Court. See generally, Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); Hazelwood School District v. United States, 433 U.S. 299 (1977); Castaneda v. Partida, 430 U.S. 482 (1977).

The practical effect of the McCleskey holding, therefore, will be to declare that capital punishment may be imposed and carried out throughout the states of the Eleventh Circuit -- Georgia, Florida, and Alabama -- even if race continues to influence sentencing decisions in those states. We strongly urge the Court to grant certiorari to review the opinion of the Court of Appeals

#### CONCLUSION

The petition for certiorari should be granted.

Dated: June 28, 1985

Respectfully submitted,

HON. JOHN CONYERS, JR. 2313 Rayburn House Office Bldg. Washington, D.C. 20515 \*SETH P. WAXMAN
2555 M Street, N.W.
Suite 500
Washington, D. C. 20037

ATTORNEYS FOR AMICUS CURIAE

By:	
-	7

\*Attorney of Record

#### CERTIFICATE OF SERVICE

I hereby certify that I am a member of the bar of this Court, and that I served the annexed Motion for Leave to File Brief Amicus Curiae and Brief Amicus Curiae on the parties by placing copies in the United States mail, first class mail, postage prepaid, addressed as follows:

John Charles Boger, Inc. NAACP Legal Defense Fund 99 Hudson Street New York, New York 10013

Mary Beth Westmoreland, Esq. 132 State Judicial Bldg. 40 Capitol Square, S.W. Atlanta, Georgia 30334

Martin F. Richman, Esq. Barrett, Smith, Shapiro Simon & Armstrong 26 Broadway New York, New York 10014

Ralph G. Steinhardt, Esq. Patton, Boggs & Blow 2550 M Street, N.W. Washington, D.C. 20037

Done this 28 th day of June, 1985.

Attorney for Amicus Curiae

Office - Supreme Court. U S

JUN 28 1985

IN THE

### Supreme Court of the Anten States"

October Term, 1984

#### WARREN McCLESKEY,

Petitioner,

against

RALPH M. KEMP, Superintendent, Georgia Diagnostic & Classification Center,

Respondent.

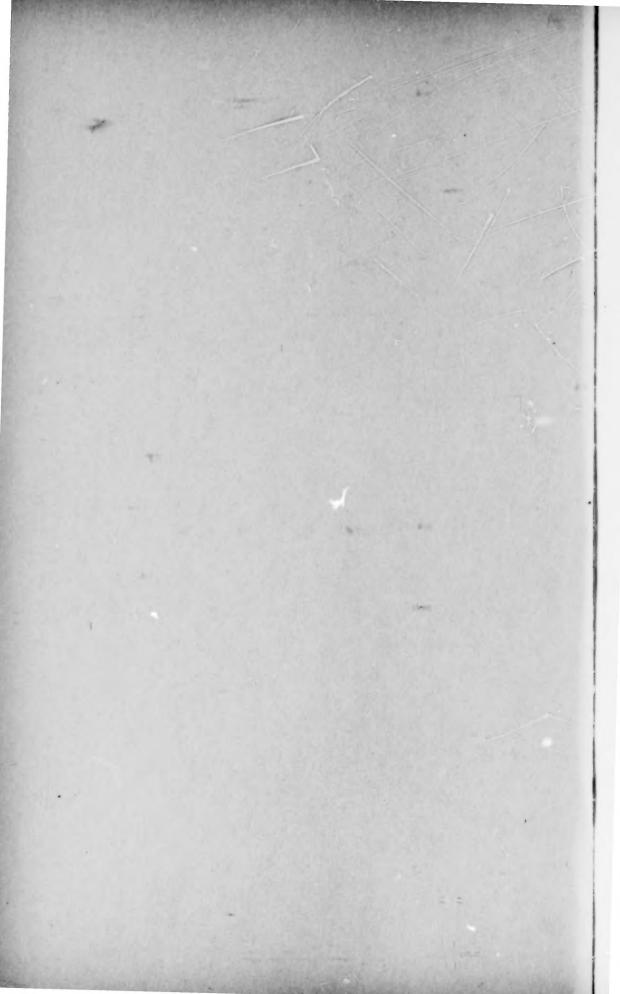
On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF AMICI CURIAE FOR DR. PETER W. SPERLICH, DR. MARVIN E. WOLFGANG, PROFESSOR HANS ZEISEL & PROFESSOR FRANKLIN E. ZIMRING IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

MICHAEL O. FINKELSTEIN
MARTIN F. RICHMAN\*
BARRETT SMITH SCHAPIRO
SIMON & ARMSTRONG
26 Broadway
New York, New York 10004
(212) 422-8180

Attorneys for Amici Curiae

<sup>\*</sup> Attorney of Record



### TABLE OF CONTENTS

							Page
TABLE OF	AUTHO	RITIE	es .	• • • • •		•••	ii
MOTION FOR							iii
SUMMARY OF	ARG	UMENT				• • •	1
ARGUMENT				• • • •	• • • • •	•••	3
ī.	Seri Both The The	Lower lously The Baldu Signi	Vali s St	dity dity udie	lued Of s And Of		3
	Α.	The	Bald	lus S	tudie	s.	5
	В.				of th		8
	c.				of the		13
II.	Of To A Scie	Stri) The Concept Intificulty This (	Rel C Me Warn	of Aliable thod	ppeal e Soc s And Revi	s ial ew	20
CONCLUSION	١						19

### TABLE OF AUTHORITIES

### Cases:

Ballew v. Georgia, 435 U.S. 233 (1978)	vi,4
Castaneda v. Partida, 430 U.S. 482 (1977)	4
Hazelwood School District v. United States, 453 U.S. 299 (1977)	. 18
International Brotherhood of Teamster v. United States, 431 U.S. 324 (1977)	
McCleskey v. Kemp, 753 F.2d 877 (11th Cir. 1985) (en	
McCleskey v. Zant, 580 F. Supp. 338 (N.D. Ga. 1984) 8,9	
Segar v. Smith, 738 F.2d 1249 (D.C. Ga. 1984)	19
Vuyanich v. Republic Nat'l Bank, 505 F. Supp. 244 (N.D. Tex. 1980)	19

	Page
Other Authorities	
Finkelstein, The Judicial Reception	
of Multiple Regression Studies	
In Race and Sex Discrimination	
Cases, 80 Colum. L. Rev. 737	
(1980)	5
Fisher, Multiple Regression in	
Legal Proceedings, 80 Colum.	
L. Rev. 702 (1980)	5
H. Kalven & H. Zeisel, The American	
Jury (1966)	V





- iii -

No. 84-6811

IN THE

# SUPREME COURT OF THE UNITED STATES October Term, 1984

WARREN MCCLESKEY,

Petitioner,

-against-

RALPH M. KEMP, Superintendent, Georgia Diagnostic & Classification Center,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

#### MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

Dr. Peter W. Sperlich, Dr. Marvin E. Wolfgang, Professor Hans Zeisel and Professor Franklin E. Zimring respectfully move, pursuant to Rule 36.1 of the Rules

of the Court, for leave to file the attached brief amici curiae in support of the petition for certiorari filed in this case. The consent of counsel for the petitioner has been obtained. The consent of counsel for respondent was requested but refused, necessitating this motion.

The interest of <u>amici</u> in this case stems from their work as social scientists whose professional contributions have significantly advanced the legal use of empirical data. Dr. Sperlich is Professor of Political Science at the University of California at Berkeley. Dr. Sperlich has taught, consulted and published widely on many criminal justice issues, including the role of juries and the use of scientific evidence in legal settings. His writings were cited prominently by the

Court of Appeals in McCleskey v. Kemp. Dr. Wolfgang is Professor of Criminology and Criminal Law and Director of theCenter for Studies in Criminology and Criminal Law at the University of Pennsylvania. During his distinguished career, Dr. Wolfgang has numerous contributions to made development of empirical research on legal His pioneering study on the influence of racial factors in imposition of death sentences for rape was the object of intensive legal examination during the Maxwell v. Bishop litigation of Professor Hans Zeisel is the 1960s. Emeritus Professor of Law and Sociology and Associate of the Center for Criminal Justice Studies at the University of Chicago. Professor Zeisel is co-author of The American Jury, widely recognized as one of the most influential empirical

studies of the legal system ever published. Professor Zeisel's empirical research on the functioning of juries was relied upon by this Court in Ballew v. Georgia, 435 U.S. 233 (1978). Professor Zimring is Professor of Law and Director of the Earl Warren Institute at Boalt Hall, University of California at Berkeley. Professor Zimring has written extensively on criminal justice issues, including juvenile crime and sentencing, the deterent value of punishment, and the control of firearms. Professor Zimring served as Director of Research for the Task Force on Firearms of the National Commission on the Causes and Prevention of Violence, and has also served as consultant to many private and public organizations concerned with the application of social scientific perspectives to legal issues.

The present case focuses on two unusually sophisticated and comprehensive social scientific studies that address on an important public issue: racial disparities in a State's capital sentencing system. In amici's judgment, the courts below have not appreciated either the remarkable soundness of that research or the significance of its findings. Amici's professional interest is not in the ultimate resolution of the legal issues presented, which involve constitutional considerations upon which amici would not presume to advise the Court. However, amici do wish to provide the Court with an informed appraisal of (i) the record facts, specifically, the two empirical studies that comprise the basis for petitioner McCleskey's constitutional claims of arbitrariness and racial discrimination; and (ii) the lower courts' evaluation of those studies. Amici hope that their views might assist the Court's resolution of this important matter.

Amici's special interest is prompted by the skepticism and implicit hostility toward statistical evidence that animate the opinions of the lower courts. Ironically, both the strengths and the limits of social scientific research have been misunderstood by the Court of Appeals.

The broad sweep of the court's language, moreover, threatens not only to end further legal use of empirical evidence in determining whether our nation's capital punishment statutes are being applied in a racially discriminatory

manner, but to discourage, as a practical matter, the use of statistical evidence in other areas of the law -- an outcome that would constitute a regrettable development in the relationship between the disciplines of law and social science.

Dated: New York, New York June 27, 1985

Respectfully submitted,

MICHAEL O. FINKELSTEIN

\*MARTIN F. RICHMAN

Barrett Smith Schapiro

Simon & Armstrong

26 Broadway

New York, New York 10004

(212) 422-8180

ATTORNEYS FOR AMICI CURIAE

BY:

MARTIN F. RICHMAN

\*Attorney of Record



No. 84-6811

#### IN THE

#### SUPREME COURT OF THE UNITED STATES

October Term, 1984

WARREN McCLESKEY,

Petitioner,

#### -against-

RALPH M. KEMP, Superintendent, Georgia Diagnostic & Classification Center,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

BRIEF AMICI CURIAE OF DR. PETER W. SPERLICH, DR. MARVIN E. WOLFGANG, PROFESSOR HANS ZEISEL AND PROFESSOR FRANKLIN E. ZIMRING

#### SUMMARY OF ARGUMENT

The Baldus studies presented by the petitioner in McCleskey v. Kemp are the most sophisticated and comprehensive

empirical studies on criminal sentencing ever submitted to any court. They have been meticulously conducted and are distinguished by state-of-the-art procedures. The analytical methods employed are appropriate, and the results -- demonstrating racial disparities in capital sentencing at a highly statistically significant level -- are sound and valid.

The District Court and the Court of Appeals display profound misunderstanding of the statistical evidence itself and of the significance of that evidence. Many of their technical criticisms are misinformed or erroneous, and their reservations about the reliability of the research are inappropriate. Most importantly, the Court of Appeals has failed to recognize the significance of the racial disparities reported by Professor Baldus; his findings

demonstrate in fact that race continues to have an important impact in death-sentencing decisions in the State of Georgia.

The opinion of the Court of Appeals also expresses a general skepticism toward social scientific methods and results that is unwarranted and possibly injurious to the continued ability of courts to make use of statistically reliable evidence — in many contexts other than capital sentencing — within the Eleventh Circuit.

#### ARGUMENT

I.

THE LOWER COURTS HAVE SERIOUSLY UNDERVALUED BOTH THE VALIDITY OF THE BALDUS STUDIES AND THE SIGNIFICANCE OF THEIR FINDINGS

To be of significant value to the courts, social scientific research, like any other evidence, plainly must be reliable. If research lacks "internal

validity" -- if its methods are inappropriate, or if its execution is careless and slipshod -- it does not deserve the serious attention of the courts.

On the other hand, when research has been meticulously conducted, when analyses are searching and exhaustive, social scientific studies, as the Court has often acknowledged, can be of great value in resolving legal disputes. See, e.g., Ballew v. Georgia, 435 U.S. 233 (1978); International Brotherhood of Teamsters v. United States, 431 U.S. 324, 339 (1977); Castaneda v. Partida, 430 U.S. 482 (1977).

Some of the most valuable contributions by social science to the resolution
of legal issues have been made in the area
of racial discrimination. Through the use
of statistical techniques such as multiple
regression analysis, social scientists and
statisticians have regularly assisted
courts in discerning the influence of race

on complex decisionmaking processes that may involve dozens of independent considerations. See generally Finkelstein, The Judicial Reception of Multiple Regression Studies in Race and Sex Discrimination Cases, 80 Colum. L. Rev. 737 (1980); Fisher, Multiple Regression in Legal Proceedings, 80 Colum. L. Rev. 702 (1980).

### A. The Baldus Studies

In our judgment as social scientists, the two studies of Georgia's capital punishment system conducted by Professor Baldus and his colleagues are examples of excellent professional empirical studies. The researchers had full access to official State files on each homicide case, permitting them to assemble data distinguished by its unusual richness and high quality. The design of the studies is sophisticated, and the number of relevant

sentencing factors considered exceeds that of any major study ever conducted in this field. The researchers have followed elaborate, state-of-the-art procedures in data collection and entry.

Professor Baldus' analytical methods, moreover, illustrate the unique contribution social science can make to legal problems. The unadjusted racial disparity in capital sentencing in the State of Georgia are striking: one whose victim is white is eleven times more likely to receive a death sentence than one whose victim is black. Professor Baldus, however, did not rest his conclusions on these unadjusted racial disparities. Instead, he used an array of increasingly more complex statistical methods to test dozens of alternative hypotheses that might have disproven or eliminated the effects of race. He turned social science methods, in other words, against his own

unadjusted findings, subjecting his data to rigorous scientific scrutiny designed to determine whether the apparent racial effects would persist when other factors were taken into account.

Although Baldus has been conservative in his findings, the adjusted influence of racial factors on Georgia's capital sentencing system remains clear and significant. Race, especially the race of the homicide victim, plays a large and recognizable part in determining who among convicted Georgia defendants will be sentenced to life and who will be sentenced to death. Baldus reports, for example, that the odds of receiving a death sentence are increased by 4.3 times if the victim is white, even when he controls for dozens of other legitimate variables.

Why, in view of the soundness and importance of these findings, have the Baldus studies been rejected by the lower courts? If the answer to this important question were solely a matter of constitutional law, we of course would have no role as <a href="mailto:amici before this Court">amici before this Court</a>. The opinions of the lower courts, however, reflect a profound misunderstanding of Baldus' research or, at best, an unwarranted mistrust of the significance of his results.

### B. The Opinion of the District Court

The District Court's opinion, in particular, recites a Luddite's list of grievances against empirical methods and procedures, almost none of which are well-founded. It asserts that Baldus' data base was "substantially flawed" because it "could not capture every nuance of every case," McCleskey v. Zant, 580 F.

Supp. 338, 356 (N.D. Ga. 1984). None of Baldus' many models, even those with over 230 variables, are deemed sufficient in the District Court's eyes, since they "have [not] accounted for ... unaccounted-for factors." Id. at 362.

These objections are fundamentally misplaced. One essential quality of statistical analysis is its power to tell us many things about a phenomenon with great reliability, without the necessity of knowing everything about that phenomenon. As a scientific matter, the likelihood that any omitted variable could significantly affect Baldus' robust racial findings -- especially when so many legitimate variables have been taken into account -- is truly negligible. By insisting on a standard of "absolute knowledge" about every case, however, the District Court implicitly rejects the value of all applied statistical analysis,

which has brought us much of what we know in medicine, genetics, agronomy and other areas of science.

The District Court also expresses general skepticism toward a range of well-established social scientific methods employed by Baldus, including multiple regression analysis, which it finds "ill suited to provide the Court with circumstantial evidence of the presence of discrimination." Id. at 372 (emphasis omitted). Indeed the only statistical method the District Court does seem to approve is the simple cross-tabular approach, id. at 354, even though the Court acknowledges that the inherent nature of the problem under study here makes it "impossible to get any statistically significant results in comparing exact cases using a cross tabulation method." Id. at 354. This preference for

cross-tabular methods lacks any scientific foundation. Baldus' methods are clearly valid and appropriate to his data.

Finally, in evaluating Baldus' results, the District Court seizes upon a somewhat confused welter of statistical issues, including Baldus' conventions for coding "unknown" data, id. at 357-59, the possible multicollinearity of Baldus' variables, id. at 363-64, and the reported  $R^2$  of his model, id. at 351, 361, as reasons for its ultimate conclusion that Baldus' results cannot be relied upon. However, Baldus and his colleagues satisfactorily addressed each of these issues and demonstrated that the racial results were not adversely affected by such concerns. Baldus not only employed the correct method of treating "unknowns"; he conducted alternative analysis to demonstrate that racial influences persisted irrespective of the method of

undoubtedly affected some of the larger models employed by Baldus; however, the District Court failed to realize that the presence of of multicollinearity would not affect the estimate of the racial results reported. It would only affect the standard error of that estimate. Finally, the Court's concern with the reported R<sup>2</sup> of Baldus' models is unfounded. Apart from the questionable relevance of the R<sup>2</sup> measure for logistic models of the type used by Baldus, an R<sup>2</sup> of .40 or higher is quite acceptable.

In sum, the District Court opinions is a compendium of basic statistical errors and misunderstandings. Its evaluation of the validity of the Baldus studies is off-target.

## C. The Opinion of the Court of Appeals

The Court of Appeals purports to take a different approach to Baldus' research: it announces that it will "assum[e] [the study's] validity and that it proves what it claims to prove," McCleskey v. Kemp, 753 F.2d 877, 886 (11th Cir. 1985) (en banc), and will base its judgment solely on the legal consequences which flow from that research. Yet even a quick reading of the Court's opinion persuades us that the skepticism which pervaded the District Court's analysis continues to dominate the treatment of Baldus' research by the Court of Appeals. After first knitting together citations from several scholarly articles that caution courts against an unreflective use of social scientific evidence, id. at 887-90, the Court announces "that generalized statistical studies are of little use in deciding whether a particular defendant has been unconstitutionally sentenced to death ... [and] are at most probative of how much disparity is present." Id. at 894. That observation misses the point: although statistics cannot determine with absolute certainty whether any one defendant may have been sentenced to death because of race, statistical evidence can determine with great reliability whether racial factors are playing a role in the sentencing system as a whole. Baldus' studies provide just such evidence.

When the Court turns to Baldus' studies, it relies a most entirely upon one summary figure dr wn from the entire body of Baldus' results -- a reported .06 disparity by race of victim in overall death-sentencing rates. As we view Baldus' research, this is but one of a number of important, meaningful results indicating a consistent racial presence in Georgia

sentence patterns. Seen as such, this figure is important, though obviously by no means the sole basis for Baldus's conclusions.

The Court of Appeals, however, misunderstands even the significance of this one figure, repeatedly describing it as a six percent disparity, see, e.g., McCleskey v. Kemp, supra, 753 F.2d at 896, 899, rather than a six percentage point disparity. The distinction is by no The overall deathmeans technical. sentencing rate in the State of Georgia is quite small, only .05, or 5-in-100. Thus a six pecentage point increase, for example, raises the death-sentencing rate from .05 to .11, a percentage increase of 120%. Baldus in fact reports a death-odds multipler effect of 4.3: that is, the odds of receiving a death sentence are 4.3 times greater if one's victim is white.

Such an impact, larger than that of a number of Georgia's statutory aggravation circumstances, scarcely seems "marginal."

Moreover, when the Court of Appeals examines Baldus' well-documented finding of a 20-point racial disparity in the "midrange" of cases, it indulges a quick succession of disparaging observations --none of which is defensible. The expert testimony at trial strongly substantiates the existence of a meaningful, statistically significant "midrange" of Georgia cases. Warren McCleskey, in fact, falls squarely within that midrange.

In sum, the Court of Appeals, like the District Court, fundamentally mistrusts Baldus' findings and undervalues their significance as proof of racial disparities in Georgia's capital sentencing system. From our perspective as social scientists, that mistrust is unwarranted. The Baldus studies are

sound; they are consistent with prior mesearch; and their basic conclusions are entitled to the confidence of the scientific and the legal communities.

#### II.

THE COURT OF APPEALS' RE-LUCTANCE TO ACCEPT RE-LIABLE SOCIAL SCIENTIFIC METHODS AND FINDINGS WAR-RANTS REVIEW BY THIS COURT

It is possible that the extraodinary reluctance of the Court of Appeals to place reliance upon Baldus' research reflects no more than an unwillingness, despite the evidence, to invalidate post-Furman capital statutes. The opinion, however, does not expressly limit its holding to death penalty cases. Instead, it articulates a standard of proof that seems applicable to other Equal

Protection Clause challenges, see, e.g., id. at 887-90, and perhaps to Title VII disparate treatment cases as well.

If so, the opinion raises important issues about the usefulness of social scientific evidence that transcend the McCleskey case itself. The contributions of social scientific evidence to the resolution of legal issues has increased significantly in recent decades, as statistical methods have improved and the confidence of the courts has grown. This Court has led the lower federal courts toward an appreciation of the nature of such evidence, and has developed legal principles, including standards of proof for parties presenting statistical evidence, that reflect a clear understanding of the powerful utility of reliable social scientific evidence. See, e.g., Hazelwood School District v. United States, 433 U.S. 299 (1977); Teamsters v.

United States, 431 U.S. 324 (1977); see also Segar v. Smith, 738 F.2d 1249 (D.C. Cir. 1984); Vuyanich v. Republic Nat'l Bank, 505 F. Supp. 244 (N.D. Tex. 1980), vacated on other grounds, 723 F.2d 1195 (5th Cir. 1984).

The Court of Appeals has disregarded these basic standards of proof that have been fashioned by the Court. Its opinion in McClesky insists upon a level of methodological purity in data quality, model design, and analysis that can be achieved only in theory. If left unreviewed, the opinion of the Court of Appeals will erect formidable barriers against the use of reliable statistical evidence that can, and amici believe, properly should be used by the courts to resolve complex legal issues that regularly come before them for decision.

#### CONCLUSION

For the reasons set forth above, amici curiae respectfully urge the Court to grant certiorari in the McCleskey v.

Kemp case and engage in a full consideration of the important questions it presents for review.

Dated: New York, New York June 27, 1985

Respectfully submitted,

MICHAEL O. FINKELSTEIN
\*MARTIN F. RICHMAN
Barrett Smith Schapiro
Simon & Armstrong
26 Broadway
New York, New York 10004
(212) 422-8180

ATTORNEYS FOR AMICI CURIAE

BY:

MARTIN F. RICHMAN

<sup>\*</sup> Attorney of Record

#### CERTIFICATE OF SERVICE

I hereby certify that I am a member of the bar of this Court, and that I served the annexed Motion for Leave to File Brief Amici Curiae and Brief Amici Curiae on the parties by placing copies in the United States mail, first class mail, postage prepaid, addressed as follows:

John Charles Boger, Inc. NAACP Legal Defense Fund 99 Hudson Street New York, New York 10013

Mary Beth Westmoreland, Esq. 132 State Judicial Bldg. 40 Capitol Square, S.W. Atlanta, Georgia 30334

Hon. John Conyers, Jr. 2313 Rayburn House Office Bldg. Washington, D.C. 20515.

Ralph G. Steinhardt, Esq. Patton, Boggs & Blow 2550 M Street, N.W. Washington, D.C. 20037

All parties required to be served have been served. Done this 27th day of June, 1985.

By:

MARTIN F. RICHMAN
Attorney of Record
for Amici Curiae



AUG 26 1008

No. 84-6811

JOSEPH F. SPANIOL, JE

## In the Supreme Court of the United States

OCTOBER TERM, 1986

WARREN MCCLESKEY, PETITIONER

v.

RALPH M. KEMP, Superintendent, Georgia Diagnostic & Classification Center

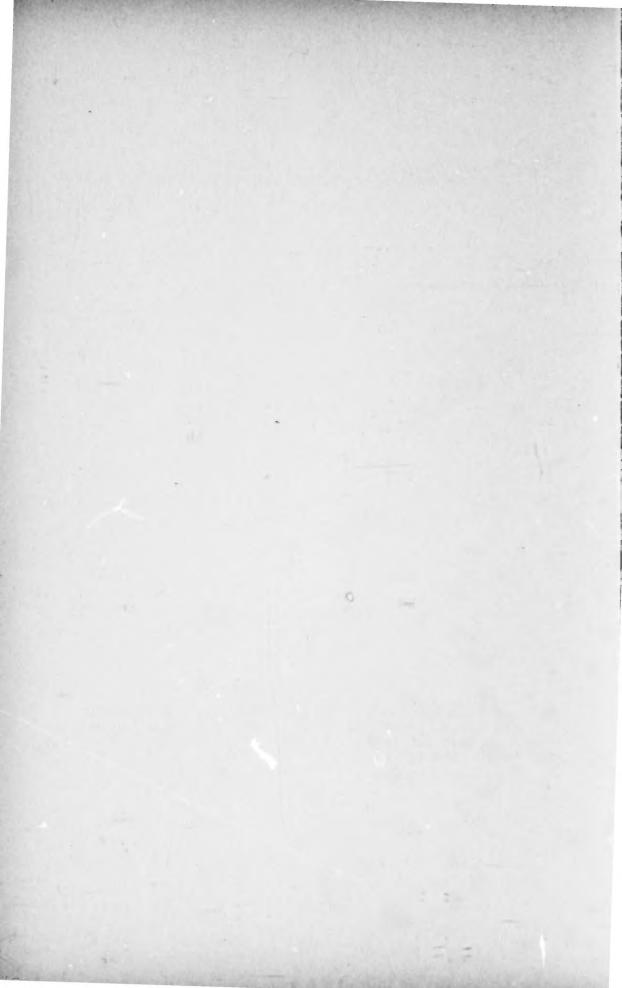
On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

#### JOINT APPENDIX

John Charles Boger \*
99 Hudson Street
New York, New York 10013
(212) 219-1900
Attorney for Petitioner

\* Attorney of Record

MARY BETH WESTMORELAND Assistant Attorney General of Georgia 132 State Judicial Building 40 Capitol Square S.W. Atlanta, Georgia 30334 (404) 656-3349 Attorney for Respondent



#### TABLE OF CONTENTS

	Pag
Chronological List of Relevant Docket Entries	
Petition for Writ of Habeas Corpus filed in the United States District Court for the Northern District of Georgia, Atlanta Divison, in McCleskey v. Zant, No. C81-2434A	
Answer and Response	2
Petitioner's Testimony	
Professor David C. Baldus (direct)	
Tr. 776-779	3
Tr. 880-886	3
Tr. 1051-1057	4
Tr. 1075-1076 Tr. 1081-1086	4
Dr. George G. Woodworth (direct)	4
Tr. 1265	5
Mr. L. G. Ware (direct)	9
Tr. 1328-1337	5
Dr. George G. Woodworth (rebuttal)	
Tr. 1734-1740	5
Dr. Richard A. Berk (rebuttal)	
Tr. 1761-1767	6
Respondent's Testimony	
Mr. L. G. Ware (cross-examination)	
Tr. 1340-1343	6
Dr. Joseph L. Katz	
Tr. 1428-1438	6
Tr. 1440-1444	7
Tr. 1447-1449	8
Tr. 1453-1459 Tr. 1484-1502	8
Tr. 1549-1553	10
Dr. Roger L. Burford	10
Tr. 1635-1641	10
Tr. 1649-1652	10
Order of the United States District Court in McCleskey	
v. Zant, 580 F.Supp. 338 (N.D. Ga. 1984), entered	
February 1, 1984	11

TABLE OF CONTENTS—Continued	
	Page
Opinion of the United States Court of Appeals for the Eleventh Circuit in McCleskey v. Kemp, 753 F.26 877 (11th Cir. 1985) (en banc), announced January 29, 1985	1
Order of the Supreme Court of the United States grant- ing certiorari and leave to proceed in forma pauperis July 7, 1986	
Note: The following exhibits were lodged with the	9
Clerk of the Court as an Exhibits Supplement:	
Petitioner's Exhibits	
DB 38	
DB 39	
DB 57	
DB 58	
DB 62	
DB 63	
DB 78	
DB 79	
DB 81	
DB 83	
DB 85	
DB 90	
DB 91	
DB 93	
DB 94	

DB 95
DB 98
DB 106
DB 107
DB 116
DB 120
DB 122
DB 123
DB 124
GW 4
GW 8

#### TABLE OF CONTENTS-Continued

Page

#### Respondent's Exhibits

17A

18A

19

20A

25

26

39

40

49

61



#### CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Date	Entry
December 30, 1981	Petition for Writ of Habeas Corpus filed in the United States District Court for the Northern District of Georgia, Atlanta Division in <i>McCleskey v. Zant</i> , No. C81- 2434A
December 30, 1981	Order of the District Court, staying execu- tion of petitioner's death sentence
June 10, 1982	Order of the District Court, denying mo- tion for an evidentiary hearing and dis- missing the petition
June 10, 1982	Judgment of the District Court, dismissing the petition without prejudice
June 18, 1982	Petitioner's motion to alter or amend the judgment
June 25, 1982	Petitioner's supplement to motion, annexing affidavit of Professor David C. Baldus
October 8, 1982	Order of the District Court, granting in part and denying in part petitioner's mo- tion to alter or amend the judgment
November 18, 1982	Respondent's motion for discovery
April 1, 1983	Order of the District Court extending time for discovery
April 7, 1983	Petitioner's motion for discovery
May 2, 1983	Response to petitioner's motion for discovery
June 3, 1983	Order of the District Court, granting in part and denying in part petitioner's mo- tion for discovery
June 24, 1983	Order of the District Court, granting further discovery

Date	Entry
July 21, 1983	Petitioner's motion to compel
July 26, 1983	Opposition to motion to compel
July 29, 1983	Pretrial conference
August 5, 1983	Order of the District Court respecting discovery
August 8-22, 1983	Evidentiary hearing before Hon. J. Owen Forrester
October 17, 1983	Further evidentiary hearing
February 2, 1984	Order of the District Court, granting habeas corpus relief
February 2, 1984	Judgment of the District Court
February 24, 1984	Respondent's notice of appeal
February 28, 1984	Petitioner's notice of cross-appeal
March 12, 1984	Order of the District Court, granting peti- tioner's certificate of probable cause to appeal
March 28, 1984	Order of the United States Court of Appeals for the Eleventh Circuit, directing the appeal to be heard initially en banc
June 12, 1984	Oral argument before the United States Court of Appeals
January 29, 1985	Opinion of the United States Court of Appeals
April 2, 1985	Order of the United States Court of Appeals, staying mandate
May 28, 1985	Petition for writ of certiorari filed
July 7, 1986	Certiorari granted

#### IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

# Civil Action No. C81-2434A WARREN MCCLESKEY, PETITIONER

-vs-

Walter Zant, Warden, Georgia Diagnostic and Classification Center, RESPONDENT

#### PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

To the Honorable Judge of the United States District Court for the Northern District of Georgia, Atlanta Division:

Preliminary Explanation: The allegations of this petition are in the form dictated by the Model Form for Use in Applications for Habeas Corpus under 28 U.S.C. § 2254, prescribed by the Rules Governing Section 2254 Cases in the United States District Courts.

Paragraphs 1 through 11 state the history of the prior state court proceedings; paragraphs 12 through 14 summarize briefly the facts of the case; paragraphs 15 through 97 state the petitioner's federal constitutional claims; paragraphs 98 through 102 contain required technical information.

- 1. The name and location of the court which entered the judgment of conviction and sentence under attack are:
  - (a) Superior Court of Fulton County Fulton County, Georgia

2. The date of the judgment of conviction and sentence is October 12, 1978.

3. The sentence is that petitioner be put to death by electrocution, and that he serve life sentences on the

armed robbery convictions.

4. The nature of the offense involved is that petitioner was convicted of one count of malice murder and two counts of armed robbery.

5. At his trial, petitioner entered a plea of not guilty.

The trial of the issues of guilt or innocence and of sentence was had before a jury.

7. Petitioner did testify during the guilt/innocence

phase of the trial of his case.

8. Petitioner appealed his conviction and sentence of death.

9. The facts of petitioner's appeal are as follows:

(a) The Supreme Court of Georgia affirmed petitioner's conviction and sentence on January 24, 1980. Mc-Cleskey v. The State, 245 Ga. 108 (1980).

(b) On October 6, 1980, the Supreme Court of the United States denied a timely petition for a writ of certiorari. *McCleskey v. The State*, — U.S. —, 66

L.Ed.2d 119-20 (1980).

- 10. Other than the appeal described in paragraphs 8 and 9 above, the only petitions, applications, motions or proceedings filed or maintained by petitioner with respect to the October 12, 1978 judgment of the Superior Court of Fulton County are those described in paragraph 11 below.
- 11. (a) On December 19, 1980, petitioner filed an extraordinary motion for new trial in the Superior Court of Fulton County. No hearing has ever been held on said motion.
- (b) On January 5, 1981, pursuant to Georgia Code Ann. § 50-127, petitioner filed a petition for a writ of habeas corpus in the Superior Court of Butts County. A hearing was held on the petition on January 20, 1981.

Petitioner's motion for funds to provide for expert witnesses was denied, and examination of witnesses was conducted without the benefit of statements in the prosecutor's files, as the habeas court did not require the attendance of the prosecutor, or a representative from the prosecutor's office, at the hearing itself. On April 8, 1981, the Superior Court of Butts County denied all relief sought.

(c) On June 17, 1981, the Supreme Court of Georgia denied the petitioner's application for a Certificate of Probable Cause to Appeal the decision of the Superior

Court of Butts County.

(d) On November 30, 1981, the Supreme Court of the United States denied a timely petition for a writ of certiorari to the Superior Court of Butts County. *McCleskey v. Zant*, —— U.S. ——, 50 U.S.L.W. 3448 (1981).

12. Petitioner was convicted and sentenced in violation of his rights guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States, for each of the reasons set forth below.

#### I. INTRODUCTORY FACTS

13. Warren McCleskey was tried and convicted for the murder of Frank Schlatt on May 13, 1978.

14. The Supreme Court of Georgia found that the jury was authorized to find the following facts:

On the morning of May 13, 1978, appellant, using his car, picked up Ben Wright, Bernard Dupree and David Burney. All four had planned to rob a jewelry store in Marietta that day. After Ben Wright went into the store to check it out, they decided not to rob it. All four then rode around Marietta looking for another place to rob but couldn't find anything suitable. They drove to Atlanta and decided on the Dixie Furniture Store as a target. Each of the four was armed. Appellant had a .38 caliber Rossi nickel-plated revolver, Ben Wright carried a sawed-off shot-

gun, and the two others had blue steel pistols. Appellant parked his car up the street from the furniture store, entered the store, and "cased" it. After appellant returned to the car, the robbery was planned. Executing the plan, appellant entered the front of the store and the other three came through the rear by the loading dock. Appellant secured the front of the store. The others rounded up the emplovees in the rear and began to tie them up with tape. All the employees were forced to lie on the floor. The manager was forced at gunpoint to turn over the store receipts, his watch and six dollars. George Malcom, an employee, had a pistol taken from him at gunpoint. Before all the employees were tied up, Officer Frank Schlatt, answering a silent alarm, pulled his patrol car up in front of the building. He entered the front door and proceeded approximately fifteen feet down the center aisle where he was shot twice, once in the face and once in the chest. The chest shot glanced off a pocket lighter and lodged in a sofa. That bullet was recovered. The head wound was fatal. The robbers fled. Sometime later, appellant was arrested in Cobb County in connection with another armed robbery. He confessed to the Dixie Furniture Store robbery, but denied the shooting. Ballistics showed that Officer Schlatt had been shot by a .38 caliber Rossi revolver. The weapon was never recovered but it was shown that the appellant had stolen such a revolver in the robbery of a Red Dot grocery store two months earlier. Appellant admitted the shooting to a co-defendant and also to a jail inmate in the cell next to his, both of whom testified for the state.

# II. GROUNDS OF CONSTITUTIONAL INVALIDITY OF PETITIONER'S CONVICTION AND SENTENCE

- (A) Failure To Disclose Understanding With Key Prosecution Witness.
- 15. The State's deliberate failure to disclose an agreement or understanding between the State and the jail inmate, Offie Evans, who testified at petitioner's trial, that a favorable recommendation regarding a pending federal escape charge would be made in exchange for his testimony violated the due process clause of the Fourteenth Amendment.

Facts supporting petitioner's claims that the State failed to disclose an agreement or understanding with key prosecution witness

16. As the Georgia Supreme Court decision indicates, the State's evidence showing that petitioner was the triggerman in the shooting of Frank Schlatt included testimony from a jail inmate, Offie Gene Evans, to the effect that petitioner had confessed the shooting.

17. At petitioner's trial, the prosecution elicited from the inmate testimony that the prosecutor had not promised

him anything for his testimony. (Tr. 868).\*

18. No testimony from the inmate was elicited regarding an agreement or understanding between the inmate and Atlanta Police detectives investigating the Schlatt killing. (Tr. 865-71).

19. An agreement or understanding existed between the inmate, Offie Gene Evans, and Atlanta Police Bureau detectives, to the effect that Bureau detectives would recommend favorable disposition of his pending federal

<sup>\*</sup> All references to the transcript of the trial held in the Superior Court of Fulton County will be prefaced with the abbreviation "Tr." References to the transcript of the habeas corpus hearing in Butts County Superior Court will be prefaced with the abbreviation "Habeas Tr."

escape charges in exchange for his testimony in petitioner's trial. (Habeas Tr. 122).

- (B) Trial Court's Failure to Permit Petitioner To Proceed In Forma Pauperis And To Provide Funds For Employment of Expert Witnesses and Investigators Contravened Petitioner's Due Process Rights Assured By The Fourteenth Amendment.
- 20. The Trial Court's failure to permit petitioner to proceed in forma pauperis and to provide funds for employment of expert witnesses and investigators contravened petitioner's due process rights assured by the Fourteenth Amendment.

Facts supporting petitioner's claim that trial court's failure to permit him to proceed in forma pauperis and to provide funds for employment of expert witnesses and investigators contravened petitioner's due process rights assured by the fourteenth amendment.

21. In the trial court, petitioner moved to proceed in forma pauperis, and for funds for expert witnesses and an investigator. The trial court failed to act favorably upon petitioner's motions.

22. Among the factual grounds cited by petitioner for his motion was the State's reliance upon "numerous experts, including pathologist, criminologist, criminal in-

vestigators, ballistic experts, and others . . . . "

23. As noted by the Supreme Court of Georgia, the State relied for its' proof against petitioner on a ballistics expert's testimony that the murder weapon was a .38 caliber Rossi. The murder weapon was not recovered, however.

24. The State's own ballistics expert testified subsequently that there were significant chances that the murder weapon was something other than a .38 Rossi. (Fite Deposition, pp. 4-7).\*

<sup>\*</sup> Fite's deposition is a part of the state habeas corpus proceeding.

25. Had petitioner been granted funds for the retention of his own ballistics expert, the expert evidence not

presented to the jury could have been presented.

2

26. Less than three weeks prior to trial, the State listed more than 100 potential witnesses which it might call at trial. Of these, 23 testified at trial, and none were interviewed by defense counsel except the three who testified at the preliminary hearing. (H. Tr. 33-37).

27. Among the witnesses who were never interviewed by defense counsel and who were not called by the State were three witnesses whose testimony would have contradicted the State's theory that only one of the parties to the crime was physically situated at the time of the shooting such as to shoot the victim.

28. The failure to provide petitioner with funds for the employment of a ballistics expert, and an investigator. substantially and materially prejudiced the petitioner's

opportunity to present his defense.

- The Court's Charge Regarding Presumptions Con-(C) travened The Due Process Clause Of The Fourteenth Amendment
- 29 The trial court's charge to the jury regarding presumptions of intent contravened petitioner's due process rights under the Fourteenth Amendment.

Facts supporting petitioner's claims that the trial court's instructions regarding presumptions of intent contravened his due process rights.

- 30. The trial court instructed the jury that it could return a verdict on guilty or not guilty on both malice murder and felony murder statutes. (Tr. 999-1000). The jury returned a verdict of guilty on malice murder. (Tr. 1010).
- 31. The trial court instructed the jury as follows regarding presumptions relating to intent as an element of malice murder:

Now, in every criminal prosecution, ladies and gentlemen, criminal intent is a necessary and material ingredient thereof. To put it differently, a criminal intent is a material and necessary ingredient in any criminal prosecution.

I will now try to explain what the law means by criminal intent by reading you two sections of the criminal code dealing with intent, and I will tell you

how the last section applies to you, the jury.

One section of our law says that the acts of a person of sound mind and discretion are presumed to be the product of the person's will, and a person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts, but both of these presumptions may be rebutted.

I charge you, however, that a person will not be presumed to act with criminal intention, but the second code section says that the trier of facts may find such intention upon consideration of the words, conduct, demeanor, motive and all other circumstances connected with the act for which the accused is prosecuted.

Now, that second code section I have read you has the term the trier of facts. In this case, ladies and gentlemen, you are the trier of facts, and therefore it is for you, the jury, to determine the questions of facts solely from your determination as to whether there was a criminal intention on the part of the defendant, considering the facts and circumstances as disclosed by the evidence and deductions which might reasonably be drawn from those facts and circumstances.

Now, the offense charged in Count One of the indictment is murder, and I will charge you what the law says about murder.

I charge you that a person commits murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being. Express malice is that deliberate intention to take away the life of a fellow creature which is manifested by external circumstances capable of proof. Malice shall be implied when no considerable provocation appears and where all the circumstances of the killing show an abandoned and malignant heart. That is the language of the law, ladies and gentlemen.

I charge you that legal malice is not necessarily ill-will or hatred. It is the intention to unlawfully kill a human being without justification or mitigation, which intention, however, must exist at the time of the killing as alleged, but it is not necessary for that intention to have existed for any length of time before the killing.

In legal contemplation, a man may form the intention to kill a human being, do the killing instantly thereafter, and regret the deed as soon as it is done. In other words, murder is the intentional killing of a human being without justification or mitigation.

(Tr. 996-999).

- 32. At the request of the jury during deliberations, the trial court repeated its instructions regarding the elements of malice murder. (Tr. 1007-1008).
- (D) Trial Court's Instructions Regarding The Use Of Evidence Of Other Alleged Acts Of Criminal Conduct For Proof Of Intent To Commit Murder Contravened The Due Process Clause Of The Fourteenth Amendment.
- 33. The trial court's instructions to the jury, that they could consider evidence that petitioner had been engaged in other robberies, none of which resulted in the killing of any person, as proof of intent, contravened the petitioner's due process rights under the Fourteenth Amendment.

Facts supporting petitioner's contentions that the trial court's instructions regarding use of evidence regarding other robberies as proof of intent to murder contravened petitioners' due process rights.

34. At trial, the prosecution offered into evidence for the purpose of showing petitioner's identity, testimony regarding a robbery which occurred six weeks prior to the shooting of Frank Schlatt. (Tr. 667, 676, et seq.).

35. The trial court instructed the jury that the evidence could be used, inter alia, for proof of intent:

"Ladies and Gentlemen, in the prosecution for a particular crime, evidence which in any manner shows or tends to show that the accused, that is, the defendant in this case, has committed another transaction, wholly distinct, independent and separate from that for which he is on trial, even though it may show a transaction of the same nature, with similar methods, in similar locations, it is admitted into evidence for the limited purpose of aiding in identification and illustrating the state of mind, plan, motive, intent and scheme of the accused, if, in fact, it does to the jury illustrate those matters.

Now, whether or not the defendant was involved in such similar transaction is a matter for you to determine, and the Court makes no intimation in that regard.

Furthermore, if you conclude that the defendant now on trial was involved in a similar transaction or these similar transactions, you should consider it solely with reference to the mental state and intent of the defendant insofar as applicable to the charges in the indictment, and the Court in charging you this principle of law in no way intimates whether such transaction, if any, tends to illustrate the intent or state of mind of the defendant. That is a question for the jury to determine, but this evidence is admitted for the limited purpose mentioned by the Court, and you will consider it for no other purpose except the purpose for which it is admitted.

(Tr. 673-74).

- 36. This overly-broad instruction permitted the jury to use the evidence of other criminal acts as evidence of intent to commit murder, even though no murder occurred in the other robbery. The overly-broad instruction contravened petitioner's due process rights.
  - (E) Trial Court's Instructions At Sentencing Phase Gave Jury Unlimited Discretion Regarding Use Of Evidence Of Other Robberies, In Contravention Of The Eighth And Fourteenth Amendments.
- 37. The Trial court's instructions at the sentencing phase, which gave the jury unlimited discretion regarding the use of evidence of other robberies, contravened the Eighth and Fourteenth Amendments.

Facts in support of petitioner's claim that the trial court's instructions at the sentencing phase of the trial gave the jury unlimited discretion regarding their use of evidence of other robberies, in contravention of the Eighth and Fourteenth Amendments.

38. At the sentencing phase of petitioner's trial, the trial court gave the jury the following instruction:

In arriving at your determination of which penalty shall be imposed, you are authorized to consider all the evidence received here in court, presented by the State and the defendant throughout the trial before you.

(Tr. 1028).

39. No other instruction was given the jury regarding its use of the evidence of other alleged robberies which had been introduced.

40. No other instruction was given regarding the degree of proof required, nor what weight, if any, might be attached to the evidence regarding other robberies.

41. The absence of instructions left the jury with unguided discretion regarding the use of the evidence of other alleged robberies, in contravention of the Eighth and Fourteenth Amendments.

- (F) Introduction Of Evidence Of Other Alleged Acts Of Criminal Conduct, Without Requisite Safeguards, Contravened The Eighth And Fourteenth Amendments.
- 42. At trial, the trial court permitted the introduction of evidence regarding other alleged robberies—once at the prosecutor's suggestion that such would help identify the petitioner as present at the shooting of Frank Schlatt, and subsequently for impeachment purposes. (Tr. 667, 676, 884, 805A, Exhibits S-32 through S-35; Tr. 848-49).

43. The trial court permitted the introduction of such evidence without imposing any of the following safeguards:

- (a) that the State make a clear showing of the probative value of the evidence to an element of the crime charges;
- (b) that the evidence not be admitted when duplicative of other evidence going to the same element of the crime;
- (c) when offered to show the identity of the perpetrator of the crime, the State must show a high degree of similarity between the other criminal conduct and the act being tried;
- (d) that the State must prove criminal conduct with respect to other alleged criminal act by the defendant by clear and convincing evidence, or beyond a reasonable doubt.
- 44. The failure to require any such safeguards, and the failure to instruct the jury with respect to any such

safeguards, contravened the due process clause of the Fourteenth Amendment.

#### (G) The Death Penalty, As Applied.

45. The death penalty is in fact administered and applied arbitrarily, capriciously, and whimsically in the State of Georgia, and petitioner was sentenced to die and will be executed, pursuant to a pattern of wholly arbitrary and capricious infliction of that penalty in violation of his rights guaranteed by the Eighth and Fourteenth Amendments to the Constitution of the United States.

Facts supporting petitioner's claim that the death penalty is in fact administered arbitrarily, capriciously and whimsically in the State of Georgia.

46. The Supreme Court of the United States upheld the Georgia capital punishment statutes "[o]n their face" only upon the assumption that the procedures mandated by the statutes would assure that sentences of death are not wantonly or freakishly imposed. Gregg v. Georgia, 428 U.S 153, 198 (1976). As those statutes have been applied, however, death sentences in Georgia have in fact been imposed in an arbitrary and capricious manner.

47. Georgia cases similar to that of petitioner in many respects, including both the nature and circumstances of the offense, the age, prior record, relative culpability, and life and character of the accused have resulted in lesser punishments than death

punishments than death.

48. Georgia cases more aggravated than that of petitioner in many respects, including both the nature and circumstances of the offense and the age, prior record, relative culpability, and life and character of the accused have resulted in lesser punishments than death.

49. There is no rational, constitutionally permissible way of distinguishing the few cases in which the death penalty has been imposed from the many cases in which

it has not been imposed.

- 50. The evidence shows, for example, that the death penalty has rarely been imposed upon persons accused, like the petitioner, of shooting an Atlanta police officer during the course of his duties. (Habeas Hearing, Exh. P-1).
- (H) Death Penalty Is Being Imposed Upon Grounds Which Are Discriminatory On The Basis of Race, Sex and Poverty.
- 51. The death penalty is imposed in this case pursuant to a pattern and practice of Georgia prosecuting attornies, courts, juries and governors to discriminate on the grounds of race, sex and poverty in the administration of capital punishment. For these reasons, the imposition and execution of petitioner's death sentence under Georgia law and practice violates the Eighth Amendment and the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

Facts supporting petitioner's claim that death penalty is imposed discriminatorily on the basis of race, sex and poverty.

52. Just as in the period prior to the Supreme Court's decision in Furman v. Georgia, the pattern of jury imposition of the death penalty is clear—black killers and the killers of white persons are substantially more likely to receive a death sentence than others. There is little statistical likelihood that these patterns would have occurred randomly or by chance.

53. Petitioner's death sentence was imposed pursuant to this pattern of racial, economic and sexual discrimination. The only accused killers of Atlanta police officers to receive the death penalty during the period from 1960 to the present have been black persons convicted of killing

white officers.

#### (I) Failure To Serve Rational Interests.

54. The theoretical justifications for capital punishment are groundless and irrational in fact, and death is thus an excessive penalty which fails factually to serve any rational and legitimate social interests that can justify its unique harshness, in violation of petitioner's rights guaranteed by the Eighth and Fourteenth Amendments to the Constitution of the United States.

Facts supporting petitioner's claim that the theoretical justifications for capital punishment are groundless in fact.

- 55. The death penalty provided by Georgia law violates the principle that a criminal sanction "cannot be so totally without penological justification that it results in the gratuitous infliction of suffering." Gregg v. Georgia, 428 U.S. 153, 183 (1976).
- 56. Executions do not have an identifiable deterrent effect. As the Georgia State Department of Offender Rehabilitation acknowledged in a November, 1972 study entitled Capital Punishment in Georgia: An Empirical Study 1943-1965, "Despite the fact that Georgia used the death penalty more often than any other state in the country, its homicide rate was also the highest in the nation. This suggests that the death penalty is not effective as a deterrent." Study at 451 (emphasis added).

57. Executions set socially sanctioned examples of, and provide an inducement to, violence.

58. Public sentiment for retribution is not so strong as to justify the use of the death penalty.

59. There is no penal purpose served by execution which is not more effectively or efficiently served by life imprisonment.

### (J) Cruel And Unusual In Light Of Circumstances.

60. Petitioner's punishment is cruel and unusual in consideration of all factors relating to the offense and the

offender, including mitigating circumstances. For this reason, the imposition and execution of his death sentence violates petitioner's rights guaranteed by the Eighth and Fourteenth Amendments to the Constitution of the United States.

Facts supporting petitioner's claim that his punishment is cruel and unusual in consideration of all the factors relating to the offense and the offender, including mitigating circumstances.

- 61. The death penalty was imposed in this case although the evidence showed that the shooting occurred without infliction of any physical or mental torture; petitioner had never previously been accused of discharging a weapon against another and the death penalty has been rarely imposed for the shooting of an Atlanta police officer during the course of his duty.
  - (K) Georgia Supreme Court's Appellate Review Has Failed To Assure That Death Penalty Was Not Imposed In An Arbitrary And Capricious Manner, Contrary To The Eighth And Fourteenth Amendments.
- 62. The Georgia Supreme Court's appellate review has failed to assure that the death penalty imposed in this case was not imposed in an arbitrary and capricious manner, contrary to the Eighth and Fourteenth Amendments.

Facts in support of claim that Georgia Supreme Court Appellate Review fails to meet constitutional standards.

63. Of the thirteen cases reviewed by the Georgia Supreme Court and relied upon by that court as a basis for concluding that the death penalty was not arbitrarily and capriciously imposed in petitioner's case, four cases were cases wherein the death penalty was subsequently overturned because it had been imposed pursuant to the

arbitrary and capricious manner condemned in Furman v. Georgia. [Johnson v. State, 226 Ga. 378 (1970); Callahan v. State, 229 Ga. 737 (1972); Whitlock v. State, 230 Ga. 700 (1973) and Bennett v. State, 231 Ga. 458 (1973)].

64. Of the remaining cases, most involved cases distinguishing them from the routine murder case in which the death penalty had not been imposed. For example, in at least three cases relied upon by the Georgia Supreme Court, the victim was shot while fleeing from the scene. Fleming v. State, 240 Ga. 142 (1977); Willis v. State, 243 Ga. 185 (1979); Collier v. State, 244 Ga. 553 (1979). No such accusation was made against petitioner.

65. In another case relied upon by the Supreme Court to find non-arbitrariness, one victim's skull was beaten in and a butcher knife was buried deep in her chest, while a second victim, a woman suffering partial paralysis from a stroke, was injured and left alone, where police found her days later. *Bowden v. State*, 239 Ga. 821 (1977). No such accusations were made against petitioner herein.

66. Pulliam v. State, 236 Ga. 460 (1976), also relied upon by the Supreme Court as evidencing non-arbitrariness, involved the shooting of a cab driver during a premeditated robbery scheme that included express plans to shoot the driver. No such allegations were made against petitioner herein.

67. Dobbs v. State, 236 Ga. 427 (1976) involved the murder of a grocery store operator who was shot while he lay helpless on the floor, with a witness begging that he be spared. No such allegations were made against petitioner herein.

68. Finally, Callahan v. State, 229 Ga. 737 (1972) (a case wherein the death sentence was overturned as imposed pursuant to an arbitrary and capricious scheme) involved the murder of an Atlanta Police officer who was stomped unconscious prior to the shooting.

69. All of the cases relied upon by the Georgia Supreme Court for a showing of non-arbitrariness involved

facts of substantially greater brutality or torture than in petitioner's case—indeed, there was no evidence whatsoever of brutality or torture in petitioner's case.

(L) Prosecutor's Impermissible Arguments To Jurors
During Sentencing Phase Regarding Appellate
Processes Contravened Petitioner's Sixth and Fourteenth Amendment Rights.

70. The Prosecutor's arguments to the jury during the sentencing phase of petitioner's trial contravened petitioner's Sixth and Fourteenth Amendment rights.

71. At the sentencing phase of the trial, the prosecutor, in seeking the death penalty, made an impermissible reference to the appellate court process in asking the jury to impose the death sentence, as opposed to life imprisonment.

The prosecutor argued:

Ladies and Gentlemen, this is the sentencing phase of this trial, and I expect the Court is going to charge you with a couple of points, that you can return a verdict of life in prison or you can return a verdict of death . . . (Tr. 1016). If you find a sentence for this man of life for murder, if you sentence him to life for armed robbery, and if you don't specify how these are to run, they are going to run together . . . (Tr. 1017).

Now, what should you consider as you are deliberating the second time here, and I don't know what you are going to consider. I would ask you, however, to consider several things . . . .

I would also ask you to consider the prior convictions that you have had with you in the jury room, and particularly the one where he got three convictions. I believe if you look at those papers carefully you are going to find, I think, on one of those he got three life sentences to begin with, and then there is

a cover sheet where apparently that was reduced to what, eighter years, or fifteen years or something, which means, of course, he went through the appellate process and somehow got it reduced.

Now, I ask you to consider that in conjunction with the life that he has set for himself.

(Tr. 1019-1020).

- (M) Admission Of Testimony Tainted By Improper Lineup Procedure Contravened Petitioner's Sixth and Fourteenth Amendment Rights.
- 72. The display of petitioner, in a highly suggestive situation in the jury box on the morning of petitioner's trial, without advice of counsel, and the subsequent introduction of testimony of three witnesses who had not previously been able to identify petitioner contravened petitioner's Sixth and Fourteenth Amendment rights.

Facts supporting petitioner's claim regarding improper lineup procedure resulting in violation of Sixth and Fourteenth Amendment rights.

73. Without any advance notice to petitioner or petitioner's counsel, the State displayed the petitioner in a highly suggestive situation in the jury box with four or five other persons the morning of petitioner's trial.

74. At least three witnesses (Classie Barnwell, Paul Ross and Dorothy Umberger) who had not previously identified petitioner as at the scene of one or more robberies to which they testified at petitioner's trial, identified him subsequent to the display in the jury box.

75. Petitioner was the only light-skinned defendant in

the jury box the morning of the trial. (Tr. 737).

76. Some of the witnesses had had very slight opportunity to view the petitioner at the time of the robberies.

77. The trial court erred in admitting the testimony which had been tainted by the pre-trial identification procedure.

- (N) Introduction Of Petitioner's Involuntary Statement Contravened Petitioner's Fifth, Sixth And Fourteenth Amendment Rights.
- 78. The introduction of petitioner's custodial statement to police officers, made involuntary and without a free and knowing waiver of petitioner's rights, contravened the Fifth, Sixth and Fourteenth Amendments.

Facts in support of petitioner's claim that introduction of statement contravened his constitutional rights.

79. The trial court permitted the introduction into evidence of testimony regarding a statement made by petitioner to Atlanta Police Bureau detectives. (Trial Tr. 506, et seq.).

80. The statement by petitioner was involuntarily

made and should not have been introduced.

- 81. The statement was induced by threats of violence made to petitioner shortly before the statement was given.
- (O) Exclusion Of Two Prospective Jurors Without Sufficient Examination Of Their Views Regarding Capital Punishment Was Constitutional Error.
- 82. The trial court improperly excused two prospective jurors without adequate examination of their views regarding capital punishment in contravention of petitioner's Sixth, Eighth and Fourteenth Amendment rights.

Facts in support of petitioner's contention that trial court exclusion of two prospective jurors without adequate examination of their views on capital punishment contravened petitioner's rights.

83. The trial court excluded two prospective jurors after a brief examination of their views regarding the death penalty. (Tr. 96-99, 128-30).

84. No inquiry was made prior to exclusion of the two jurors regarding their ability or inability to set their convictions aside and do their duty as a citizen; nor were they asked what effect the State's request for the death penalty might have upon their deliberations regarding guilt.

85. The Court made no inquiry regarding whether their views regarding the death penalty would affect their

ability to abide by their oath as jurors.

86. The evidence upon which the Court excluded the jurors was inadequate, and the Court's failure to make further inquiry before excluding both was error.

- (P) Petitioner Was Denied The Effective Assistance Of Counsel In Contravention Of The Sixth And Fourteenth Amendments.
- 87. Petitioner's trial counsel's failure to take a number of necessary steps prior to, during and after petitioner's trial constituted ineffective assistance of counsel in contravention of petitioner's Sixth and Fourteenth Amendment rights.

Facts in support of petitioner's ineffective assistance of counsel claim.

- 88. Among the actions, and failures to act, which constitute ineffective assistance of counsel are the following:
- (a) Counsel's failure to interview a single witness prior to trial;
- (b) Counsel's failure to secure the testimony of witnesses who would have given testimony in support of either of the two defenses which defense counsel recognized were available to defendant;

(c) Counsel's failure to develop expert testimony regarding the identity of the murder weapon;

(d) Counsel's failure to examine the prosecutor's in-

vestigative file until the eve of trial;

(e) At trial, counsel failed to object to trial court instructions which were contrary to Supreme Court standards; (f) Counsel's failure to object to the District Attorney's argument to the jury which directed the jury's attention to the appellate processes wherein life sentences

had been reduced to 15 or 18 years;

(g) Counsel's failure to develop on cross-examination of one of the State's key witnesses testimony regarding promises made to him by Atlanta police detectives regarding favorable recommendations which would be made in exchange for his testimony;

(h) Counsel's failures to move for a continuance or mistrial when he was taken by surprise regarding the pretrial lineup procedure conducted in the courtroom the

morning of trial;

(i) Counsel's failure to prepare for the sentencing

phase of the trial;

(j) Counsel's failure to develop testimony regarding petitioner's life history which could have been considered by the jury in mitigation of the guilt finding;

(k) Counsel's failure to respond to trial court's request that he review the Court's sentencing report for accuracy.

- (Q) State Wrongfully Withheld from Petitioner Statements Made To or By Prosecution Witnesses Which Materially Prejudiced Petitioner in Contravention of His Due Process Rights.
- 89. The State's pretrial withholding of statements made to and by prosecution witnesses contravened the due process clause of the Fourteenth Amendment.

Facts in support of petitioner's claims that withholding of statements to or by two prosecution witnesses contravened the due process clause of the Fourteenth Amendment.

90. Prior to trial, petitioner sought through a Brady motion statements of witnesses material to the prosecution of the case. The State withheld from petitioner the statements of two witnesses—one an alleged confession of the defendant allegedly made to a jail inmate and the

other an impeaching statement made by one of the prosecution witnesses.

- 91. The withholding of those statements materially prejudiced the trial of the petitioner, and contravened the due process clause of the Fourteenth Amendment of the Constitution of the United States.
- (R) Evidence Upon Which Petitioner Was Convicted Failed to Prove His Guilt Beyond a Reasonable Doubt.
- 92. Petitioner was convicted upon evidence which failed to prove his guilt beyond a reasonable doubt, in contravention of the due process clause of the Fourteenth Amendment.

Facts in support of petitioner's claim that evidence failed to prove his guilt beyond a reasonable doubt.

93. Petitioner was tried on the State's theory that he was the triggerman who killed Frank Schlatt.

94. The State's theory was that only one of the persons who robbed the Dixie Furniture Store was physically located at the time of the shooting so as to have the opportunity to have fired the shots which killed Frank Schlatt, and that petitioner was that person.

95. Witnesses for the State were unable to state which of the co-defendants who were in the front portion of the Store during the robbery was the triggerman (Tr. 245) or the direction from which the shots came. (Tr. 293-94).

- 96. The expert testimony on which the State relied as to the murder weapon was that it was "probably" a .38 Rossi. (Tr. 413).
- 97. The evidence which the State offered as a basis for petitioner's conviction was insufficient to prove beyond a reasonable doubt that petitioner was guilty.
- 98. Each of the grounds listed in paragraphs 15 through 97 have been previously presented to the state courts.

99. Other than the extraordinary motion for new trial filed in December, 1980, petitioner has no other motion, petition or appeal now pending in any court, state or federal, as to the judgment under attack.

100. The petitioner was represented by the following

attorneys:

(a) at the preliminary hearing, trial and appeal to Georgia Supreme Court: John Turner, Esq., now with the Fulton County District Attorney's Office, Fulton County Courthouse, Atlanta, Georgia;

(b) on petition for certiorari: Robert H. Stroup, Esq., 1515 Healey Bldg., 57 Forsyth St., N.W., Atlanta, Georgia; Jack Greenberg, James M. Nabrit, III, John Charles Boger, 10 Columbus Circle, New York, New York;

(c) in state habeas corpus, application for certificate of probable cause to appeal to Georgia Supreme Court, and petition for writ of certiorari to United States Supreme Court: Stroup, Greenberg, Nabrit and Boger.

101. Petitioner was convicted on one count of malice

murder and two counts of armed robbery.

102. Petitioner has no future sentence to serve after completion of the sentences imposed by the judgment under attack.

WHEREFORE, petitioner WARREN McCLESKEY prays that this Court:

- 1. Issue a writ of habeas corpus to have petitioner brought before it to the end that he may be discharged from his unconstitutional confinement and restraint and/or be relieved of his unconstitutional sentence of death;
- 2. Conduct a hearing at which proff may be offered concerning the allegations of his petition;
- 3. Permit petitioner, who is indigent, to proceed without prepayment of costs or fees;
- 4. Grant petitioner, who is indigent, sufficient funds to secure expert testimony necessary to prove the facts as alleged in his petition;

5. Grant petitioner the authority to obtain subpoenas in forma pauperis for witnesses and documents necessary to prove the facts as alleged in his petition;

6. Allow petitioner a reasonable period of time subsequent to any hearing this Court determines to conduct. in which to brief the issues of law raised by this petition;

7. Stay petitioner's execution pending final disposition

of this petition; and

8. Grant such other relief as may be appropriate.

Respectfully submitted.

/s/ Robert H. Stroup ROBERT H. STROUP 1515 Healey Building 57 Forsyth St., N.W. Atlanta, Georgia 30303 JACK GREENBERG JAMES M. NABRIT, III JOHN CHARLES BOGER 10 Columbus Circle New York, New York 10019 Attorneys for Petitioner

# UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

[Title Omitted in Printing]

#### ANSWER AND RESPONSE

COMES NOW, Walter D. Zant, Respondent in the above-styled action, by and through the Attorney General for the State of Georgia, and makes this Answer and Response to the habeas corpus petition which has been filed on behalf of Warren McCleskey:

#### CONVICTIONS

1.

Respondent admits that Petitioner is presently being held in the custody of Respondent at the Georgia Diagnostic and Classification Center, Butts County, Georgia, pursuant to a death penalty and consecutive life sentences imposed by the Superior Court of Fulton County, following Petitioner's October 12, 1978 convictions in said courts for the offenses of murder and two counts of armed robbery.

**EXHAUSTION** 

2.

Since it appears that Petitioner has previously, unsuccessfully raised, in the state courts of Georgia, all of the grounds which he raises in the instant application for federal habeas corpus relief, Petitioner has fully exhausted his available state remedies.

# TRANSCRIPTS AND EXHIBITS AVAILABLE

3.

The following are attached as Respondent's Exhibits in support of this Answer and Response:

- (1) Respondent's Exhibit No. 1—A copy of the official record and supplemental record from Petitioner's trial in the Superior Court of Fulton County, Georgia.
- (2) Respondent's Exhibit No. 2—A copy of Petitioner's trial transcript from the Superior Court of Fulton County consisting of Volume I and Volume II.
- (3) Respondent's Exhibit No. 3—A copy of the opinion of the Georgia Supreme Court following Petitioner's direct appeal to said court. McCleskey v. State, 245 Ga. 108, 263 S.E.2d 146 (1980).
- (4) Respondent's Exhibit No. 4—A copy of the original and amended state habeas corpus petitions filed on behalf of Petitioner. (Exhibits omitted).
- (5) Respondent's Exhibit No. 5—A copy of the transcript of Petitioner's state habeas corpus hearing in the Superior Court of Butts County.
- (6) Respondent's Exhibit No. 6—A copy of the deposition of Fulton County District Attorney, Russell Parker, which was submitted to and considered by the state habeas court.
- (7) Respondent's Exhibit No. 7—A copy of the deposition of Georgia Bureau of Investigation Ballistics Expert, Kelly Fite, which was submitted to and considered by the state habeas corpus court.
- (8) Respondent's Exhibit No. 8—A copy of the order from the Butts County Superior Court denying

Petitioner's request for state habeas corpus relief.

- (9) Respondent's Exhibit No. 9—A copy of the June 17, 1981, order from the Georgia Supreme Court, denying Petitioner's application for a certificate of probable cause to appeal from his state habeas corpus action.
- (10) Respondent's Exhibit No. 10—A copy of the November 30, 1981, notification from the Supreme Court of the United States, denying Petitioner's application for a writ of certiorari to the Superior Court of Butts County.

Respondent knows of no other transcripts or relevant exhibits which are available.

# SPECIFICALLY ANSWERING THE ALLEGATIONS RAISED IN THE PETITION

#### FIRST DEFENSE

1.

Respondent denies all those allegations set out under Ground A of the petition, and paragraphs 15 through 19 thereunder, which assert that Petitioner's constitutional rights were violated through the state's failure to disclose an alleged agreement for favorable treatment supposedly entered into by a witness and state authorities.

2.

Respondent denies all those allegations set out under Ground B of the Petitioner, and paragraphs 20 through 28 thereunder, which aver that Petitioner's constitutional rights have been violated as a result of the refusal of the trial court to provide funds to Petitioner for a ballistics expert and an investigator.

3.

Respondent denies all those averments under Ground C of the petition, and paragraphs 28 through 32 thereunder, which aver that Petitioner's constitutional rights were violated as a result of the trial court's instructions to the jury regarding presumptions on intent.

4.

Respondent denies all those allegations set out under Grounds D and E of the petition, and paragraphs 33 through 41 thereunder, which aver that Petitioner's constitutional rights were violated as a result of the trial court's instructions during the guilt/innocence and sentencing phases of Petitioner's trial, pertaining to the jury's consideration of other alleged criminal acts on the part of the Petitioner.

5.

Respondent denies all those averments under Ground F of the petition, and paragraphs 42 through 44 thereunder, which assert that Petitioner's constitutional rights were violated through the trial court's admission of evidence pertaining to other criminal activities of the Petitioner.

6.

Respondent denies all those averments under Grounds G, H, I and J of the petition, and paragraphs 45 through 61 thereunder, which aver that the death penalty as applied in Georgia, is being imposed in an arbitrary or capricious fashion, and upon discriminatory grounds based on sex, race and/or poverty. Respondent further denies those averments under the aforesaid paragraphs which assert that Petitioner's death penalty is unconstitutional, because it allegedly fails to serve rational public interests, has no theoretical justification, or is cruel and unusual punishment under the specific facts of this case.

7.

Respondent denies all those averments under Ground K of the petition, and enumerated paragraphs 62 through 69 thereunder, which aver that the Georgia Supreme Court has engaged in an inadequate review of Petitioner's death penalty, to insure that it is not arbitrary, capricious, disproportionate, or violative of the Eighth and Fourteenth Amendments to the United States Constitution.

8.

Respondent denies all those averments under Ground L of the petition, and paragraphs 70 through 71 thereunder, which assert that Petitioner's constitutional rights were violated during the sentencing phase of this trial, as a result of improper prosecutorial argument.

9.

Respondent denies all those averments under Ground M of the petition and paragraphs 72 through 77 thereunder, which assert that Petitioner's constitutional rights were violated and his conviction was obtained, as a result of a highly suggestive, improper pretrial identification procedure.

10.

Respondent denies all those averments under Ground N of the petition, and enumerated paragraphs 78 through 81 thereunder, which assert that Petitioner's conviction was unconstitutionally obtained as a result of the introduction of an involuntary confession into evidence at Petitioner's trial.

11.

Respondent denies all those averments under Ground O of the petition, and enumerated paragraphs 82 through 86 thereunder, which aver that Petitioner's constitutional rights were violated at his trial as a result of the alleged improper exclusion for cause of prospective jurors who

had expressed unyielding opposition to capital punishment.

#### 12.

Respondent denies all those averments under Ground P of the petition, and enumerated paragraphs 87 through 88 thereunder, which assert that Petitioner received ineffective assistance of counsel prior to and during his Fulton County trial.

#### 13.

Respondent denies all those averments under Ground Q of the petition, and enumerated paragraphs 89 through 91 thereunder, which assert that Petitioner's constitutional rights were violated as a result of the prosecution's failure to make a pretrial disclosure of statements from two witnesses who later testified at Petitioner's trial.

#### 14.

Respondent denies all those averments under Ground R of the petition, and enumerated paragraphs 92 through 97 of the petition which assert that the evidence was insufficient to prove Petitioner's guilt beyond a reasonable doubt.

#### 15.

Respondent denies all those allegations of the petition which assert that Petitioner is being unconstitutionally incarcerated, or that his convictions and sentences are illegal and in violation of any of Petitioner's constitutional rights.

#### 16.

Respondent denies all those allegations of the petition not hereinbefore specifically admitted, denied or otherwise controverted.

# SECOND DEFENSE

Since the Georgia Supreme Court, in a full and fair hearing on direct appeal, and the Butts County, Georgia, Superior Court, in a full and fair state habeas corpus hearing, have correctly determined that none of Petitioner's constitutional rights have been violated, this Court should adopt the findings of the state courts below, and should summarily dismiss the instant petition as being without merit.

WHEREFORE, having made this Answer and Response to the habeas corpus application which has been filed by Warren McCleskey, Respondent respectfully submits that said petition should be dismissed, and that Petitioner should be remanded to the custody of Respondent for completion of his challenged sentences.

Respectfully submitted,

MICHAEL J. BOWERS Attorney General ROBERT S. STUBBS II Executive Assistant Attorney General

MARION O. GORDON Senior Assistant Attorney General

JOHN C. WALDEN
Senior Assistant Attorney General
NICHOLAS G. DUMICH
Assistant Attorney General

[Certificate of Service Omitted in Printing]

# UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

[Title Omitted in Printing]

#### PETITIONER'S TESTIMONY

#### PROFESSOR DAVID C. BALDUS

#### (DIRECT)

[776] THE WITNESS: The, the impact of a factor, my remarks [777] applied to the impact of any factor will become apparent only when there is really room for the exercise of discretion.

If the cases are of a type that are basically unthinkable with respect to whether or not there should be a death penalty, these are not highly aggravated cases, there's no likelihood that we're going to sentence these cases to death. As a consequence, no one individual factor, except the basic factor that put them in that category where the likelihood of a death, prospect of a death sentencing seems unthinkable, basically, no one factor is going to have very much effect on those cases.

The place where factors have an influence in the decision making process is where there is room for the exercise of discretion, where the decision maker has a choice, the facts allow some sort of choice. If the case is so mitigated that the death sentence is unthinkable, the race of the victim is not going to have any effect. It's only as the cases rise in the level of aggravation that the prospect of a death sentence becomes thinkable, that these factors begin to have an effect. And I would say, Your Honor, it's not just the race of victim that seems to be having that effect in this system, it's all the factors,

all the other mitigating factors. When you're looking at the very lowly aggravated cases, that if you look for example whether the defendant surrendered within 24 hours, the one we looked at here earlier, doesn't seem to have any effect. If you [778] look at almost all the other, sort of marginal aggravating factors, statutory and non-statutory aggravating factors, they don't seem to have much effect. You have got to get the case aggravated up to a level where there's really serious consideration given to whether or not this is a death worthy case.

That's when all sorts of factors come into play, and show their effects statistically, and that's why we see a statistical effect in only the right side of this table, because it's only on the right side of this table that serious consideration is given to the imposition of a death sentence.

In these other cases over here, we have a handful of death sentences, but they aren't enough statistically to have any effect, given the tremendous number of cases that are involved in those categories. And that's why we see these effects, I believe, as the cases become more aggravated.

And as I'll point out in a later, later testimony, your honor, what further happens is that when the cases become tremendously aggravated so that everybody would agree that if we're going to have a death sentence, these are the cases that should get it, the race effects go away. It's only in the mid-range of cases where the decision makers have a real choice as to what to do. If there's room for the exercise of discretion, then the factors begin to play a role.

This is a phenomenon that's widely noted in the [779] literature in various fields that the influence of factors over decisions comes to bear only when there's real room for the exercise of discretion.

THE COURT: Don't fudge unless you have some leeway to fudge, some way to explain what you're doing. THE WITNESS: That's right. Most systems are— THE COURT: That's human nature. Now that you've explained it in a scholarly way I recognize it as being a principle I have observed in life.

[880] So what we did was to focus in on cases that looked like they were the best candidates to receive a death sentence, given the facts of their cases. And that resulted in the identification of approximately five hundred cases. I made that judgment on the basis of looking at this, this table.

Q. Which table do you mean?

A. DB-89 and I said well, the top two levels there is probably where we'll see the best sense of where the likelihood of a [881] death sentence takes hold, up to the point of where the likelihood of a death sentence is very high.

And I focused in on those cases, and if you will, sort of enlarged the breakdown within those cases, expanded the subdivision of cases within that sub-group.

Q. And let me direct your attention to DB-90 marked for identification. Can you identify that document?

A. Yes. DB-90 is the result of that enlargement of that top category of approximately five hundred cases.

Q. You're talking obviously not about an enlargement of number of those case, but an enlargement of a microscopic view, if you would, of how those cases are sorted?

A. Yes. Putting it more precisely, a further subdivision of the cases along the same index that was used to create DB-89.

Q. What does DB-90 reveal?

A. DB-90 presents the race of victim disparities controlling for the race of the defendant.

And what we see here is in column B, column A, an identification which is presented in column A of the levels of predicted likelihood, that is, we go from level one to eight, from the least likely predicted death sentence to

the most likely predicted death sentence, given the factors that were being used, these are the factors that tend

to explain the results.

And you can see in column B the actual death sentencing [882] rate among these sub-categories of cases. And these sub-categories were defined in terms of equal numbers of cases. I tried to make the categories equal, but because of the, where the scores broke, sometimes the categories were not the same and I wanted to keep each case with an identical score in the same category. That's why the categories vary as they do in size.

And I calculated first the death sentencing rate among those categories, so you can see even within the top five hundred group of cases that still the death sentencing rates do not begin to rise to a very high level until you get up into the top four categories, and even there they

are not very high.

It's not really until you get up into the very highest category, eight, that the death sentencing rate sharply rises. I'll mention to you, although it's not reported here, that among that top 58, if you look at the top 40 in that category, my recollection is that every one of those offenders received the death sentence. Those are the most aggravated cases.

Now, this table presents in C and D the death sentencing rate among black and white victim cases, in

those cases involving a black defendant.

And one can see that in the lower categories here where the death sentencing rate is not elevated, that the racial disparities are not great because there are no, there's no death sentencing rate basically.

But once the death sentencing rate begins to rise, [883] you'll note that it rises first in the white victim cases. It rises there more sharply than it does in the black victim cases. That can be seen by comparing, if you move down C and D, comparing the comparable figures at each level along the way. You can see that the numbers rise more sharply at each step along the way in

column C than they do in column D. And when you make a comparison of those numbers, as we have done in E and F, you get some measure of the race of victim disparity.

And the other feature of this is that we start out with substantially equal treatment in the cases where the death sentencing rate is low, the death sentencing rate rises, and the disparities rise.

But once the cases become quite aggravated, that's up in this category 8, the death sentence, the death sentencing rate goes up quite high, but the disparities begin to decline. And we'll note here in this top category, it drops down to .16. But as I mentioned earlier, if you further subdivided that you would find that among the top forty of these cases, the death sentencing rate is the same for the black and the white victim cases, because in that category, everybody is getting a death sentence.

What these numbers support is the hypothesis that's been developed in earlier research, most notably in the work of Harry Calvin, and Hans Zeizel who published a very extensive analysis of jury decision making in a book called "The American [884] Jury." It was published in 1966.

And in that book, they developed a hypothesis, a tested hypothesis, what they call the liberation hypothesis and in short what it was, that the exercise of discretion is concentrated in the area where there's real room for choice. If the imposition of a penalty or a conviction is not thinkable because the evidence is just not there, those are the cases they were dealing with, guilt convictions at trial, or the evidence is overwhelming, that no reasonable person could disagree that this person could be convicted, they saw no racial effects, no effects of any arbitrary factors in the decision process.

But when you look at the cases in the mid, what they call the mid-range, where the facts do not call clearly for one choice or another, that that's where you see there's room for the exercise of discretion. They characterize it, if you will, the facts liberate the decision maker to have

a broader freedom for the exercise of discretion, and it is in the context of those decisions that you see the effects of arbitrary or possibly impermissible factors working.

And that's the pattern we see here in this table, where the race, the disparities rise as we move into this grey area, where the facts are not clear, and the evidence that the facts are not clear on culpability is that among these classes of cases the death sentencing rate is not high.

But once the cases become quite aggravated, they reach [885] a point where no reasonable person could disagree that if we're going to have a death sentence, these are the cases that deserve it, then the disparities disappear.

MR. BOGER: Your Honor, at this time, I move the admission of DB-89 and DB-90 into evidence.

MS. WESTMORELAND: Same objection.

THE COURT: All right, they'll be admitted.

MR. BOGER: Thank you, Your Honor.

### BY MR. BOGER:

Q. Professor Baldus, have you done the same sort of analysis with respect to the race of defendant disparities, among these highly aggravated cases?

A. Yes. The, the, a comparable analysis, Your Honor, for the race of defendant disparities in the context of white victim cases, is shown in DB-91, and it shows the same sort of pattern.

Basically, what we've done here is relocate the columns C, D, G and H that were presented in DB-90. We just reordered them so we were able to control for the race of victim and now measure disparities in terms of the race of the defendant.

And columns C and D show those disparities, and as one goes down columns C and D, you can see that the, as the cases become more aggravated, the death sentencing rates rise more sharply in the cases involving black offenders than they do in the cases involving the white offenders. And that is what produces the disparities that are apparent in columns E and F.

[886] And again we see evidence of the liberation hypothesis here. The disparities are weak, or non-existent virtually in the less aggravated cases. In the central range is where we see them, the mid-range of cases is where there is more ambiguity as to the appropriateness of a death sentence, and then they disappear in the high level category. Up in this category where 88 percent of the people receiving the death sentence, there's virtually no disparity. Those are cases that apparently are such that considerations of racial factors are just overwhelmed by the facts in the cases. And we see no effects in those contexts. That's what the data suggests to me.

[1051] This survey of police officer cases, in Fulton County, produced the following count.

We found ten cases involving police officer victims or rather we found a total of ten police officer victims in Fulton County under the statute that was enacted on March 28, 1973.

Among those cases were 18 offenders associated with those homicides in one way or another.

Of those 18 offenders, I mention in passing, 18 offenders who were not killed by the police in the course of a gunfight or something like that, those who survived, of those 28, there were 17 dispositions.

There was one case where the police record that we looked at suggested that the person was mentally deranged and there was no disposition in the case. I don't know what happened. But by virtue of that characteristic of the offender, it does not seem appropriate to me to include in this analysis.

So that left us with 17 offenders who were potentially comparable to McCleskey.

However, a -

Q. Let me ask you before you go further, you've got 17 defendants, and you said you had 10 police homicides.

Just to begin with the summary in effect, how many death sentences resulted from this number?

A. One.

Q. Who is that?

[1952] A. That was McCleskey's.

Q. Did you conduct any analysis to determine why McCleskey's case had advanced to a death sentence, and others dropped out earlier?

A. Well, I can tell you, counsel, I can tell you the

disposition of these cases.

Q. Fine?

A. As they worked their way through the system.

THE COURT: Am I looking at DB-115?

MR. BOGER: Perhaps we could follow through DB-115, yes, Your Honor.

#### BY MR. BOGER:

Q. If you could identify that document, Professor Baldus?

A. Yes. DB-115 is a footnote from our report which lists the 17 offenders, and ten police officer victims of that, that this analysis relates to.

Q. And does it accurately list those?

THE COURT: Just to clarify the record, the victims here all died as a result of whatever the offenders did?

THE WITNESS: Yes, Your Honor.

THE COURT: Okay.

# BY MR. BOGER:

Q. And you've accurately examined the list and to the best of your knowledge it's true?

A. Yes.

[1053] Q. If you could take us through the disposition of these cases?

A. Yes. Our analysis focused on the cases that we thought would be, were most comparable to Warren McCleskey's.

That means that we wanted to look at cases where the defendant was a trigger man, and the case also involved a serious contemporaneous offense, because according to the standard that we've been using before for a, classifying cases, we had viewed as less culpable than McCleskey, cases in which the offender was not the trigger man.

So we sorted the cases into two categories and they produced a pool of seven cases in which there was a trigger man, including McCleskey, who was also involved in a serious contemporaneous offense.

And those serious contemporaneous offenses were purglary, armed robbery, and in one case the shooting of another person in the course of the homicide.

The, of those, let me make one correction there. That's seven cases in addition to McCleskey, by my count here.

- Q. Professor Baldus, let me direct your attention to DB-116 marked for identification, and ask you if you can identify that as part of your discussion of the disposition of these cases?
  - A. This is DB-116?
  - Q. That's right?
- A. Yes, number 116 lists the offenders. The first page of 116 breaks them down into categories that I just described.

[1054] But first at the top it lists all 17 offenders, and shows the race of victim and race of defendant characteristics of the cases, and the outcome with respect to a life or death sentence.

The second row and third row indicate the more or less aggravated cases as classified in the fashion I just described.

And in the succeeding pages present a, working papers that show race of victim and race of defendant disparities among these cases.

And then following that are the police records that were used to compile this tabulation, as well as summaries from the back, rather at the back of this exhibit, Your Honor, you'll find summaries of the type you've seen before we generated in our study because of the 17 defendants, there were four who happened to be in our study. So we included their summaries here as well.

So, to return, if I could, to the disposition of these seven offenders, you can see at the beginning of DB-116, there are seven people, not including McCleskey, who were involved in a serious contemporaneous offense, and the trigger man.

Of those seven offenders, three of them pled guilty to murder, and had no penalty trial following the guilty

plea.

An additional two went to trial on murder charges and were convicted and there was no penalty trial held thereafter.

Two other offenders went to trial on murder charges, [1055] and they were convicted and had a penalty trial. And of those two penalty trials, my records show that one received the death sentence and one received a life sentence.

- Q. And the death sentence was?
- A. McCleskey's.
- Q. So out of the seven, five either pleaded guilty to murder or were convicted at trial of murder, and did not advance to a penalty phase, is that correct, sir?
  - A. That's what my records show, yes.
- Q. And the jury disposed of one case at the penalty phase with a life sentence and one with a death sentence?
  - A. Yes.
- Q. What did you conclude from this analysis of the police victim homicide cases in Fulton County with respect to racial impact?
- A. Well, first of all, with respect to the overall race effect in these cases, it's hard to draw any inference because we only have one death sentence. We have a lot of white victim, officer victim cases, where the defendant pled out, so there is not as substantial disparity in terms of the death sentencing rates in these two populations. There's only one death sentence, so the rate is low in both sets of cases. So you don't see a strong overall effect, number one.

The only hint one might get from this is that in the other penalty trial case that was held where a life sentence was [1056] returned, the victim in that case was a black victim. But we're dealing there with a sample of two cases and certainly one can't make very much of that, even though it is consistent with the other evidence as to what was going on in the earlier stages.

The, the principal conclusion that one is left with is that, that this death sentence that was imposed in McCleskey's case is not consistent with the disposition of cases involving police officer victims in this county. That there were a number of other cases that were comparable in terms of having, involving a serious contemporaneous offense and involving the defendant as a trigger man where for a variety of reasons, principally decisions by prosecutors, the case did not result in a death sentence.

So I can say that the pattern of decision in this county is that there's a very low death sentencing rate, and in officer cases, in fact, the only one is the petitioner in this proceeding.

So, this, by the way, is consistent statewide. There's not an important, terribly high effect associated with having a police officer victim statewide, as well.

And when you look at that fact, that killing a police officer statistically does not show an important impact either in Fulton County or statewide, you also examine the fact that the overall death sentencing rate in this county is low. very low, it's low even among the more aggravated categories of cases [1057] in this jurisdiction, and you take into account that even in B2 cases, involving a serious contemporaneous offense, the death sentencing rate is low in Fulton County, even among the more aggravated cases.

What this suggests to you is that McCleskey's case falls in this grey area where liability and culpability are not overpowering, and this is the kind of case where our research and the literature concerning the liberation hypothesis suggests that you would find the greatest likelihood that some inappropriate consideration may have come to bear on the decision.

In an analysis of this type, obviously one cannot say that we can say to a moral certainty what it was that influenced the decision. We can't do that.

What we do know is what the overall pattern was, the overall rates, the type that invite a wide range in the exercise of discretion in this kind of case, and there's nothing that looms in McCleskey's record that would clearly distinguish his case from these other cases.

In a circumstance like that, it seems, it is my opinion that a racial factor could have been the consideration that tipped the scale against McCleskey in his case.

[1075] Q. All right. Let's look over at DB-112. Now you've not identified that document to date.

If you could tell me what that is, Professor Baldus?

- A. Yes. DB-112 was the final, it reflects the final step in our analysis of the near neighbors in Fulton County. It gives a thumb nail sketch of Fulton County, black victim cases involving an equal or greater level of culpability of Warren McCleskey with a life sentence imposed.
- Q. And does it therefore fit into the overall analysis you previously testified to about the significance of the near neighbors?
- A. Yes. In the conduct of a near neighbors analysis of the type we did. One can make comparisons between comparable cases [1076] and estimate rates at which they are disposed of in a different fashion.

Another approach is to take an individual offender, and compare him with other cases that you think are of equal or greater culpability, in which a lessor sentence was imposed.

And that's what the purpose of this analysis is, was, was to identify those cases that, in which one perceives an overall level of culpability that in my judgment was

comparable to McCleskey's, and sort those cases into the category of black victim. These are the—

Q. Does this table reflect in effect the product of your analysis, or one of the bases on which you relied in com-

pleting this near neighbors analysis?

A. Yes. This is one of the reasons that I have the opinion that with respect to the serious cases that are potential candidates for capital punishment in Fulton County, that you see that there are in fact race of victim effects because it's hard in my opinion to distinguish these cases in terms of their death worthiness, if you will, from Warren McCleskey's case and yet these are all black victim cases that received a life sentence.

# [1081] BY MR. BOGER:

Q. Finally, Professor Baldus, I will ask you one closing question.

Are you familiar with a term used in social sciences called triangulation?

A. Yes.

Q. What does it mean?

A. The concept of triangulation relates to the approach that one takes of employing a variety of different methods to address the same question.

The concept has the same meaning that it does in navigation, where one, dead reckoning in sailing for example, one takes sights at different points and gets bearings and lays the bearings over top of one another and if the bearings all focus on the same point, they give one confidence that one has properly identified himself on the map.

[1082] We recognize in that process that every one of those, each of those bearings has some error in them. None of them is perfect. But that the combined message of it tells you, especially when they produce the same results, that you are getting a correct picture.

And so it is in statistical analysis, or quantitative analysis of all types, that we take different procedures and address the same question. We know that each procedure gives us merely an estimate.

But we examine the same data with different procedures, and see the extent to which we get the same answer, using alternative procedures. And in this case, we also used qualitative methods, actually making case comparisons, and we found we got the same sort of answer.

In addition, the notion of triangulation extends to the use of different data sets which provide, which raise the same questions and potentially provide the same answers.

In this case, we have two completely different data sets that address at least two of the critical points in Georgia's charging and sentencing process. There, again, we used alternative methods to address the questions posed with respect to the racial effects at each one of those stages and we found comparable results.

It's this widespread consistency that we see in the results of many analyses using two distinct data sets, looking [1083] at different sub-sets of the data sets, different stages in the process, it's this triangulation approach, if you will, that provides the principal basis for our opinions that I have stated earlier in this proceeding, about my belief that there are real race effects operating in the charging and sentencing system in this state.

MR. BOGER: No further, questions, Your Honor.

THE COURT: Let me—don't go away Mr. Boger, because I have one question.

MR. BOGER: Fine.

THE COURT: To clarify my thinking at this point. Thinking about disparate treatment cases, and the difficulty of proving disparate treatment with statistics, are you able to quantify in McCleskey's case the part that race of the victim played in his getting the death penalty, under your view?

THE WITNESS: No. I can give an opinion based upon an analysis of the data, but I can't say a particular factor constituted fifteen or twenty percent of the force.

We, the, we can say, Your Honor, when we look at a, an aggregate group of decisions, we can say a particular factor will explain a certain amount of the variation that we see in the results of the aggregate.

We can also say as we've tried to do here, that when we examine the impact of a particular set of variables in a system, [1084] that you can roughly estimate the relative importance of them. But it's only an estimate.

That, I think, is as far as you could go with respect to quantitative methods in trying to identify the impacts of factors in a system.

I think our estimate, another measure we used is the impact, practical impact that these effects have in the system was the comparison we did between the population of death row as it is, as to what we might expect in a very hypothetical circumstance. That's a measure of the practical impact that these factors are having in the system.

THE COURT: Well, the trouble with that table, I thought an awful lot about it since I excluded it from evidence, there is no logical foundation for the thesis that if you got prosecutors and juries to clean up their act, under your view of their wrongdoing, that the death penalty rate would remain at its present rate.

Essentially what you're saying, in these figures to me, is that what you testified to with the first of those two tables, and that is, the system is reacting less partially against the homicide committed against a black person than it is against a white person, and if they applied standard treatment, it would be the higher number.

That was, it's so very speculative, you could probably argue the other side of the coin as well, either being the [1085] devil's advocate or because you really believe it, either one. That was the trouble I had with that as being a practical measure.

300

But in terms of the preponderant motivating factor or anything like that, could you in fairness say that what caused McCleskey to get the death penalty as opposed to anybody else, was the fact that he murdered a white per-

son as opposed to a black person?

THE WITNESS: No, I can't say that was the factor, no. But what I can say, though, is when I look at all the other legitimate factors in his case, and I look to the main line of cases in this jurisdiction, statewide, that are like his, particularly the way B2 cases and cases involving officer victims are disposed of in this jurisdiction, his case is substantially out of line with the normal trend of decision on such cases, and given that it is aberrant in that regard we are forced to ask ourselves what could cause it.

I can't see any factors, legitimate factors in his case that would clearly call for it, that would distinguish it clearly from the other cases. The cases are not identical, but there's nothing really cries out for why this case should be treated that much differently.

So you're left with what other factor it might be, and what I can say, and what I do say is that the racial factor is possibly the thing that made the difference in the case. Real [1086] possibility in my estimation, that that's what made the difference. But I can't say with any, I can't quantify the likelihood that that is true. That's as far as I think I can go in terms of making responsible judgment.

# DR. GEORGE G. WOODWORTH (DIRECT)

[1265] Q. Now, Professor Woodworth, do you have any opinion, based upon your conduct of these diagnostic tests, on whether the statistical procedures for calculat-

ing statistical significance levels in your report and in the studies before the court are valid and acceptable?

A. My opinion is that the statistical procedures used in preparing the report are valid, yes.

Q. And what, therefore, is your opinion, if any, on

the issue in question about race of victim?

A. My opinion is that on the basis of a variety of analyses, and the convergence of different forms of evidence that the race of victim effect cannot be explained by errors in statistical technique.

#### MR. L. G. WARE

#### (DIRECT)

[1328] Q. Okay. Before we focus on the reports you do for the board, let me ask you just a couple more preliminary questions.

Are you familiar with the educational requirements necessary for being hired in the parole officer position?

[1329] A. You have to have an undergraduate degree.

- Q. And is it your understanding that all parole officers have that undergraduate degree before they're hired?
  - A. At this time, they are.
- Q. All right. Do you know how long that requirement has been in effect?
  - A. No, sir, I sure don't.
- Q. Okay. Now, focusing on the reports that you were involved with in preparing for the board of pardons and paroles, since 1976, I think you indicated. Is that correct?
  - A. Right.
- Q. What, is that the primary responsibility of the field representative, or the, I guess you called it a parole officer, job title?
- A. The field parole officers do investigations and supervision of parolees.

Q. What is involved in the, is there an investigation report that is done on persons who become subject to the state correction system?

A. We do an investigation on, I guess, just about

everybody that goes into the system now.

Q. All right. Just so that that's clear, would that include everyone who has entered a plea or who was convicted of a murder charge?

A. I think that would be accurate, yes, sir.

[1330] Q. And how about the same with respect to voluntary manslaughter?

A. We would still do an investigation.

Q. All right. What is tht purpose of the investigation that you do?

A. Just to provide information to the parole board about a particular crime that was committed.

Q. All right. Excuse me. Now, what time is the, what's the timing of this investigation?

Let me ask that question again.

When, I think you said that, let me back up, and be clear.

When you were doing reports, you were doing them in Augusta during your whole time period?

A. Right.

Q. Okay. When you, would you just briefly describe the process in developing an investigation when you were in Augusta doing these reports?

A. We received a request from our records department to conduct an investigation. The legal investigation—you want me to go into details on it?

Q. Please, just generally describe the steps involved in preparing the report? The legal, what you call the legal report?

A. We check local criminal records, we go to the clerk of [1331] court, get sentence information, indictments, jail time affidavits, we get police reports from the agency that handled the case.

And we write up a report with that information in it and submit it to the board.

- Q. All right. In terms of the timing of this, how soon after a conviction would you routinely be conducting an investigation?
- A. Just a short time. I don't know exactly. As soon as the clerk of court submits the conviction data to the department, the Department of Corrections, they in turn notify us, so it's a short time.
- Q. All right. Are there any categories of information that are routinely contained in police reports that would be omitted by you in your reports?

A. Not that I know of.

THE COURT: Excuse me, counselor, but as we are talking about reports generated during the mid-70's and available in the '80-'81 periods, you probably need to make sure this witness is focused on the time period.

MR. STROUP: All right, sir.

# BY MR. STROUP:

- Q. With respect to the reports that you prepared for the parole board, for use by the parole board, and I think you indicated that was the period 1976 through, up until and until 1983. Is that correct?

  [1332] A. Yes.
- Q. All right. With respect to those reports, would there be anything contained in the police reports that you would routinely omit?
  - A. Not that I'm aware of.
  - Q. All right.

MR. STROUP: Excuse me one moment, Your Honor.

# BY MR. STROUP:

Q. All right, in describing generally the process that was involved in obtaining the reports for the parole board during the period that you've just identified, what, if the case involved a homicide, what other sources

other than the police report and the clerk's office would

you routinely contact?

A. If our report, if we didn't think the report had all the information that we thought we needed, we may interview the officers that were involved in the case.

Q. All right?

- A. And that particular type case, we probably would.
- Q. You probably would?

A. Yeah.

- Q. All right. Are there ever any occasions in preparing the report when you called upon other local officials related to the trial of the case?
- A. Okay. We possibly would talk to the district attorney that handled the case.

[1333] Q. In what situations would you do that?

- A. In murder cases, rape cases, armed robbery, the more serious offenses.
- Q. And what would be the information sought from the district attorney?

A. Just his comments concerning the case.

Q. Can you tell of any examples of comments from the district attorney that you would receive?

A. Not in particular.

Q. Well, would it go to his impressions regarding what happened at the, involving the particular crime?

A. Yes, sir, it could.

Q. All right. Can you tell me of any other examples?

A. No, sir.

Q. Were there any guidelines in effect that directed that, directed you in the steps that you should take in conducting this investigation for the parole board report?

A. The manual that you have.

Q. All right.

THE COURT: Was that manual in effect in the mid-70's?

'THE WITNESS: We had a manual. I think that particular manual there was not completed until around '79, I think. I don't remember the exact date.

THE COURT: After it was completed, did you go back and conform the reports that had been previously supplied to the [1334] parole board with the manual or did the old reports remain as prepared under the old procedure?

THE WITNESS: As far as the procedure for conducting our investigation, I don't think that was changed. It was just that they updated the manual, if I understand

your question.

THE COURT: Well, for example, did you generate such reports as you've been testifying about in '72, '73, '74?

THE WITNESS: Yes, sir, the board, since it was created, they, you know, we've had to submit or officers have had to submit the same type investigation.

THE COURT: Did you follow the same procedures

in '72, '73, '74 as are outlined in that manual?

THE WITNESS: Yes, sir, as well as I can remember.

# BY MR. STROUP:

- Q. Let me direct your attention to paragraph 3.02 of those guidelines, if I might?
  - A. Okay.
- Q. Would you—is it your recollection that those guidelines were in effect throughout the time period, '72 through 1983?
  - A. As well as I can remember.
  - Q. All right?
- A. I can't say for sure. I didn't deal directly with the parole board at that time.
- Q. All right. But from 1976, you did, isn't that correct?
  - A. Yes, sir.

[1335] Q. All right. And what does that guideline at paragraph 3.02 state with respect to the need of the parole board to have complete information regarding the crime that has occurred?

A. You want me to read a particular part?

Q. Well, it—if you see a part in there that addresses that, yes?

A. Talking about the thoroughness of the report?

Q. Yes, what does, what do the guidelines call for?

A. I have three whole pages.

Q. All right. If you would just read the, beginning

"the importance of this report" sentence?

A. Okay. "The importance of this report cannot be overemphasized. And where the offender has been convicted of crimes against the person, it is imperative that officer extract the exact circumstances surrounding the offense."

Q. And the next one?

A. "Any aggravating or mitigating circumstances must be included in the report."

Q. And then let me direct your attention to paragraph 2 on that same page, with regard to what is thought regarding prior offenses?

Does it call for a, as complete a documentation as possible with respect to prior offenses?

A. I don't see it in that particular paragraph.

Q. Maybe I misread it.

[1336] That paragraph in fact goes toward the detail with respect to particular offenses, is that correct?

A. Yes, sir.

Q. All right. Turning to paragraph 9 on the next page, does that indicate what should be included in the report with respect to the circumstances of the particular offense?

A. Yes, sir.

Q. All right. Could you just read what that paragraph calls for?

A. "Circumstances of the offense. This should be obtained in narrative form. It should be taken from the indictment, the district attorney's office, the arresting officers, witnesses and the victim. A word picture telling what happened, when, why, where, how and to whom should be prepared. Other information to provide includes

the date of arrest, dates in jail from time of arrest to date of conviction on present offense. If the subject is on bond, on escape or in a mental institution during part of this time, this should also be shown by giving appropriate dates. If the offender was arrested and held in jail in another State in connection with this offense, the date in custody either in the other State or in Georgia should be given. If he was arrested on other charges, the date he was released on the other charge must be shown."

- Q. Was there also any requirement imposed by the guidelines or suggested by the guidelines that indication should be given in [1337] the report as to the source of the information?
  - A. Yes, sir.
  - Q. Is that paragraph 10?
  - A. Yes, sir.
- Q. And it indicates that the source of the information should be identified?
  - A. Yes, sir.
- Q. And then with respect to the guidelines again, is there any particular comment in the guidelines with respect to persons who have received life sentences or sentences in excess of fifteen years?

I direct your attention to that?

- A. Okay.
- Q. What does it read?
- A. "Parole officers should be as thorough as possible when conducting post-sentences on persons who have received life sentences or sentences in excess of fifteen years."
- Q. All right, sir. When you conducted reports, did you, yourself, attempt to follow the guidelines as described in the operations manual?
  - A. Yes, I did.

# DR. GEORGE G. WOODWORTH (REBUTTAL)

[1734] Q. Let me give you some documents that I've marked for identification as GW-8, and I'll ask you to examine them and identify them.

A. GW-8 is a reproduction of a previous exhibit. It shows for black defendants our estimated probabilities, or if you prefer, average rates of death sentencing at various levels of aggravation, as defined by 39 aggravating and mitigating background variables.

Mr. McCleskey has an aggravation score of .52, and I've indicated approximately where he's located on the

aggravation [1735] scale.

As you can see that places him in a class of defendants where there is roughly a twenty percentage point or greater disparity between black victim cases than white victim cases as estimated by our model.

Now, I-

8

Q. Now I want to direct your attention to a slightly different direction and come back to this notion of average disparities and your conclusions about them.

But you have a table, Table 1 in GW-4, about which you've previously testified, which involves a number of different diagnostic tests and analyses that you performed on several of the important models by which you and Professor Baldus have testified.

Do all of these analyses in Table 1 of GW-4 give an accurate estimate of the race of victim disparities, and the race of defendant disparities?

A. No, indeed, they don't. This was intended as a series of diagnostics. Some of these rows do indeed give valid unbiased estimates of disparities. In ways that I'll elaborate on in a moment.

Other rows in this table were simply intended to exercise the regression model in certain ways to see if it was going to break under the strain, to speak colloquially,

and the indict influential case analysis is an example of that.

[1736] The figure .041 in the co-efficient column is in no way—

Q. Now, this is which model?

A. Pardon me. In the mid-range model, in the row marked DLS, with 48 most influential cases removed, we see a regression co-efficient of .041.

Now that is not intended to be an estimate of the magnitude or even the average magnitude of the race of defendant disparity in the universe. This is, the entire and sole thrust of that row in the table is that the race of victim effect is not concentrated in a small number of cases, rather that it occurs throughout the data set.

- Q. Well, now, do you, as a professional statistician, have figures in which you have confidence concerning the overall estimate of the race of victim disparity as shown by the data that you've collected and analyzed?
  - A. Yes, I do.
  - Q. What are they?
- A. As Professor Baldus has indicated, we adopted a triangulation approach in this the study. I have perhaps two, maybe three legs of the triangle represented here, I guess it's perhaps even a quadrilateral at this point.
  - Q. When you say here, you mean Table 1?
  - A. Table 1.

The first row, WLS, weighted least squares, provides an estimate of the average disparity, averaged across all levels of [1737] aggravation. The fact that we've—

Q. This is using the mid-range model?

A. Yes. Again I'm referring to the mid-range diagnostic model, and its estimates that on average, there's an eight percentage point disparity between black and white victim cases.

Now that's, of course, averaged across all levels of aggravation.

Q. Have you computed where Mr. McCleskey's case would fall using that method, or that model?

- A. Well, as you recall, this method does not give estimates at individual aggravation levels. It's an average estimate over all aggravation levels.
  - Q. All right.
- A. So this .076 would not refer specifically to any defendant but to the average overall defendants.
  - Q. Right.
- A. The second row here, marked OLS, is biased. It's a biased estimate. It was placed in there again to exercise or to test the breaking point of the model to see if the race of victim effect was due to the use of weights.

The worst case analysis again is not intended to give unbiased estimates.

I've commented on the influential case analysis.

The weighted least squares, second order interactions, represents what I consider to be the most accurate achievable [1738] least squares regression estimate.

- Q. What is that number?
- A. Well, that number varies as you can see from, from, excuse me. I have lost the exhibit number.
  - Q. Are you talking about GW-8?
  - A. I believe this is 5-A.
  - Q. Okay?
  - A. Figure 2.

As we can see, the disparity between black and white victim cases in this case for black defendants, varies with the level of aggravation. So one can't quote a single figure.

- Q. Well, can you look at Mr. McCleskey's own case in terms of that—
- A. Yes, I can. As a matter of fact, I have checked for the racial disparity at Mr. McCleskey's level of aggravation in, in the 3 legs of our triangulation method.

In this particular case, as I testified to earlier-

- Q. And you're referring now to GW-5A?
- A. Yes, excuse me, GW-5A.

Mr. McCleskey's level of aggravation, the racial, race of victim disparity is 22 percentage points. And that is a

graphic estimate. I could give a more precise one by communicating with my computer.

I have also located as I said Mr. McCleskey in Pro-

fessor Baldus' exhibit 90.

[1739] Q. That involved the eight levels of aggravation?

A. That involved the index method, one of the three legs of our triangulation procedure.

Q. What was the result for Mr. McCleskey under that

method?

A. I would have to consult that table, so I could clarify it.

Q. Fine. I'll be glad to hand you that.

A. I don't need to look at it, well, in this exhibit, DB-90, Mr. McCleskey is located at level 5 of the aggravation index, and we can see that at level 5 of the aggravation index, the black victim cases, black victim cases have an average death sentencing rate of .17, that is to say, 17 percent; white victim cases have an average rate of 35 percent, rate, period, not an average rate, 35 percent; and the disparity is there for 18 percentage points by the index method, at maximum level of aggravation.

Q. You referred to a third leg to this triangulation?

A. The third leg of the triangle is a logistic regression, and for this purpose, we can look at unweighted logistic, which we believe, which we have reason to believe gives unbiased estimates, and we find a logistic regression coefficient of 1.24. Again referring to my Table 1 under the mid-range model, unweighted logistic, is 1.24.

Now if you recall that 1.24 is not directly interpretable. It has to be translated into a death odds multiplier and

its death odds multiplier is 3.5.

[1740] Now, at Mr. McCleskey's level of aggravation, the black victim cases have odds of about 15 to 85 of receiving death. That's, the odds are 3 to 17.

Now if we increase those odds by the death odds multiplier, namely multiply the odds by three and a half, we get odds of 10.5 to 17, which translates into a probability of 38.2. Thus the disparity, the estimated disparity under the logistic regression model, at Mr. McCleskey's level of aggravation, is 38.2 percent, minus 15 percent, which works out to be 23 percent, if I did my arithmetic right.

So we have almost complete convergence of the three legs of our triangle. The index method suggests that at Mr. McCleskey's level of aggravation, the disparity between white and black victim cases is 18 percentage points.

The weighted least squares with interactions giving sufficient flexibility to match Mr. McCleskey's case, gives us an estimated disparity of 22 percentage points.

And the logistic method which I just mentioned gives

us an estimate of 23 percentage points.

So one, so, it would seem that at Mr. McCleskey's level of aggravation the average white victim case has approximately a twenty percentage point higher risk of receiving the death sentence than a similarly situated black victim case.

# DR. RICHARD A. BERK (REBUTTAL)

[1761] Q. Doctor Berk, there's been some testimony, well, perhaps I can start with the same place, do you recall in Doctor Katz' report some discussion of the, what he called the problem of unknowns information in the data set that was worked from in this study?

A. I do.

Q. Had you ever encountered a problem of that sort?

A Well, in two senses I have.

One is, as is apparent from my vita, I was on the National Academy of Science's panel on Sentencing Research which was a two-year project by the U.S. Department of [1762] Justice to review what was known about the determinants of sentencing and some recent reforms

of sentencing procedure. It was an interdisciplinary group of statisticians, law professors, the head of California Department of Corrections, a judge and so on, and in our discussions, data quality became salient, because since especially in the earlier work data quality was an extraordinarily serious problem.

Q. Was there ever a problem in the discussions there with regard to how to treat a situation where a file might not reflect information and whether or not one could or should infer that that might mean a decision maker didn't have that information?

A. Yes. The first point that was to be stressed is that whether or not missing data or a problem is first of all a substantive, not a statistical problem. It's not something that a statistician alone can judge, because it's substantive in its roots. And this became clear as judges and public defenders and so forth on our sentencing panel kept reminding us academics that these were real people making real decisions, and that missing data depended upon what was available to the decision maker at the time.

And if a piece of information was not available when a decision was made, it was missing in a very general sense, but it was also irrelevant in another sense and could be treated as absent as opposed to just missing.

[1763] Q. Occasionally, I take it there may be some situations where the record with regard to particular kinds of data might not have something, but based on the knowledge of the system, one could assume that the individual decision maker might have had that particular information?

A. That's right. There can be legitimate missing data. I'm not at all saying that is not a factor. I'm just saying that there's a clear distinction between data that really was available when a decision was made that somehow your net didn't catch, as opposed to data that was not available when a decision was made and was gen-

erally, therefore, irrelevant to the decision maker's actions.

Q. Which of those categories do you understand Professor Baldus to have treated most of the unknowns in that case?

A. To the best of my understanding, the vast majority of, quote, missing data in the Baldus effort were of the kind that they were unavailable to the decision maker when the decision made, and therefore are not missing in the sense of being a mistake in the data collection effort.

Q. How did that interpretation or treatment of that data by Professor Baldus compare to the, any analyses that were done in the National Academy of Science's discussions you were involved in?

A. The major point is that the panel emphasized the need to be sensitive to the substantive implications of missing data in a [1764] particular case. And that is precisely to my understanding what Professor Baldus and his colleagues did.

Q Now with regard to data that you say is truly missing where you don't know—

A. It's a mistake?

Q. It's just a mistake or a gap in the record?

A. Uh huh.

Q. Are there techniques that can be utilized statistically to deal with that?

A. There is a wide variety. One only has to thumb through the most recent issue of the major journals to find many articles in which imputation is a major activity. The U.S. census, for example, does it all the time as a matter of course.

Q. To the extent that there might be that kind of missing data in Professor Baldus' study, do you have any way of assessing what the impact of that might have been or might be on his results?

A. Well, that's a bit more complicated.

I did look at the some of the data and of course I have some familiarity with the stability of the results.

My feeling is if the missing data were such a problem two things would happen which do not happen in the Baldus work.

One is the aggravating and mitigating circumstances which clearly have effects by and large as anticipated wouldn't show anything. If it really is garbage in and garbage out, we [1765] wouldn't be finding effects consistent with the way we believe the system to work.

The second point is if it was really garbage, then very very minor changes in which variables were included would flip the important effects from positive to negative and positive back again.

And what you find, for example, in race of victim is that while the size of the co-efficient will vary in magnitude, one never has a sign flip.

Another way of saying it is if there's really nothing going on, one would be as likely to find errors producing negative co-efficients as positive co-efficients, with the average over different models, perhaps, being zero.

What we find in situation after situation is a consistent effect in which race of victim makes a difference in one direction. That's not what you normally find if there are bad problems with missing data that are distorting results.

Q. In terms of the normal, are there any conventions or estimates you can give of the magnitude of the missing data. Quote, problem?

A. These are rules of thumb that different researchers develop and they are enormously context specific, so that an amount of missing data in one problem might be quite different than the implications in another.

In criminal justice research, which I've been doing for [1766] a decade, and as members of the panel were as well, missing data of the order of 10, 15 percent, almost never makes a difference. You can't quarantee it, but it almost never makes a difference.

When you start losing three or four times that much, then you have more serious problems.

Q. Do you have any recollection or idea where Pro-

fessor Baldus' study falls on that kind of scale?

A. For the variables that seem particularly important and relevant, my recollection was that missing data numbers were, the true missing data numbers were much much smaller than the danger levels that people usually look for.

Q. So in your opinion, based on your knowledge of this research and your experience in related research, do you see any reason to doubt the findings of Professor Baldus and Doctor Woodworth with regard to race, due to the, either the treatment or the existence of unknowns?

A. Of course, one can never be certain, and an academic would never tell you he was certain, even if he was, but this has very high credibility, especially compared to the studies that we reviewed. We reviewed hundreds of studies on sentencing over this two-year period, and there's no doubt that at this moments, this is far and away the most complete and thorough analysis of sentencing that's been done. I mean there's nothing even close. There are several studies underway which are comparable, but they're not on death penalty and they're not that far along.

[1767] Q. When you say the survey you took, was that death penalty studies or all sentencing studies?

A. All sentencing studies, death penalty studies included.

#### RESPONDENT'S TESTIMONY

# MR. L. G. WARE

### (CROSS-EXAMINATION)

## [1340] BY MS. WESTMORELAND:

- Q. Mr. Warr, in relation to this report that you were [1341] discussing the preparation of, the parole officer's report, at what stage in the proceeding against a particular offender is this report prepared?
  - A. After he's convicted.
- Q. So after he's, would that be after he's entered the state prison system?
- A. He's already entered the state system. We're not notified until after he's entered the state system and becomes, he's assigned a number, institution number, and corrections notifies us when they pick him up.
- Q. So your information would reflect the total information that's been accumulated during both prior to the trial and during the trial and after the trial, instead of just information that was known prior to trial, would that be correct?
  - A. Right. Any, any information, yeah, I say yes.
- Q. In making, when you indicated that you, I believe, solicited comments from the district attorneys in making these reports, was that accurate as well?
  - A. Yes.
- Q. Did you ask, were you given a form for a, specific inquiries, specific questions to be asked of the district attorneys or was it just a general question?
- A. It was a general question, if they had any comments about a particular case.
- [1342] Q. So there were no specific areas that you were instructed to ask about?
  - A. No.
- Q. As far as going back and talking to the police officers instead of just relying on the police officer re-

ports, was that routinely done in specific categories of cases?

A. I wouldn't say routinely. That's sort of left up to

the individual officers.

THE COURT: Well, we're dealing with murder cases here, so if you would restrict your answers to your perceptions of what happened in the homicide and murder cases.

THE WITNESS: The guidelines, I think, say, the policy is that we would probably, or the board would want to contact the officers that handled the case, but if we had a thorough enough investigation, offense report, filed by the law enforcement officers, if it was detailed, and we wouldn't necessarily contact them.

### BY MS. WESTMORELAND:

MS WESTMORELAND: That's all the questions, I have. Thank you.

MR. STROUP: No questions, Your Honor.

THE COURT: Wait just a minute. I guess you're principally familiar with the reports turned out by the Richmond County const. bulary those are the one that you saw most often, is that right?

[1343] THE WITNESS: Yes, sir.

THE COURT: What format were those police reports?

THE WITNESS: The reports that the officers filed? It's in a, they've got a form that they fill in vital statistics on, and then, they, there's open space after that where they actually write out the offense report.

THE COURT: How long is that?

THE WITNESS: I guess it would be according to the individual case. I guess that's the easiest way to answer it. It would be according to the individual case.

THE COURT: Do you have a feeling of what you typically encountered in homicide and murder cases? Was it always greater than ten pages, always less than two?

THE WITNESS: I never saw one that was ten pages long. I say probably a couple pages, 3 pages, maybe.

THE COURT: My personal impression from having looked at police reports in other positions, is that they very often are kind of like investigative summaries of what the officer in charge of a case discovered.

Is that a fair characterization of what you saw?

THE WITNESS: Yes, sir. We, there would be, I would think, several reports. The arresting officers, or the first officer at the scene would usually file, you know, a real short report. Then it would be turned over to the investigators, and they would give a, more detailed information.

#### DR. JOSEPH L. KATZ

#### (DIRECT)

[1428] Q. Doctor Katz, I remind you, you're still under oath this morning.

If we could backspace just briefly, Doctor Katz, to catch up a little bit on what we've done in the past day.

Can you explain for us just very briefly what data sets you have utilized in preparing the tables that we're presented to the court?

A. Yes. I received three different tapes or boxes of cards. In late January. I received four boxes of computer cards which contained the information for the procedural reform study, and a magnetic tape, which contained the data for the charging and sentencing study.

Then approximately July 30, I received a second tape which contained 3 files concerned with the charging and sentencing study.

Finally, on August 8, I received another magnetic tape which contained 3 files for the charging and sentencing study and two files for the procedural reform study.

Q. And is it this later tape that you utilized yesterday in rerunning certain tables? A. Yes.

Q. Would you refer to a document that has been

marked Respondent's Exhibit 17A?

[1429] MS. WESTMORELAND: And at this time, I'll note for the record we're withdrawing Respondent's Exhibit 17 which I believe was identified but not admitted.

## BY MS. WESTMORELAND:

Q. Would you identify Respondent's Exhibit 17a

please?

MR. FORD: Your Honor, I don't have any documents marked with exhibit numbers, so perhaps if we could refer to tables or some other way I could follow along.

MS. WESTMORELAND: Certainly. We didn't quite

get the opportunity.

Respondent's Exhibit 17 was labeled as Table 1 and that is the table that is being withdrawn.

## BY MS. WESTMORELAND:

Q. And if Doctor Katz could state the heading of Respondent's Exhibit 17A.

A. "Counts of the number of unknowns for variables

in the procedural reform study."

Q. And would you just identify this table for us,

please, Doctor Katz?

A. Yes. I prepared this table yesterday, after running some computer runs utilizing the data from the procedural reform study that I was given on August 8.

I have selected the 607 cases out of the 818 cases that were given to me in those computer files that were equivalent to the 607 cases that I was given earlier in January. [1430] I also looked at both procedural reform study files that I had given to me on August 8, and I got pretty much the same results.

Q. And has this, was this table then run from the

most recent tape that you were provided?

A. Yes. And I compared the two different files that

I had for the procedural reform study.

As far as I can tell, they are equivalent, although I haven't been able to do intense analysis to determine that fact. But I don't believe that it will affect the number of unknowns, since I checked it over with respect to both those files.

MS. WESTMORELAND: Your Honor, at this time, we would submit into evidence and ask the court to admit Respondent's Exhibit 17A.

THE COURT: Mr. Ford?

MR. FORD: As I understand it, this is the same as Table 1, which the court has already admitted, so—

THE COURT: I have not.

MR. FORD: You have not admitted it?

My only question would be then ultimate relevance of the unknowns, Your Honor, and not all of it has been tied up, but later on, but if so, I have no objection.

THE COURT: It shows something about the com-

pleteness of the data base, and I will admit it.

MR. FORD: Thank you, Your Honor.

[1431] MS. WESTMORELAND: Thank you, Your Honor.

## BY MS. WESTMORELAND:

Q. Doctor Katz, I believe at the previous, on, on Tuesday, we had also referred to a document which at that time was marked Respondent's 18, which was Table Roman Number 2.

And I don't know if we had submitted it or not. If we have, I'll withdraw the exhibit.

Would you refer to what you have labeled as Respondent's 18A, and give the heading for that table, please?

A. Yes. The heading of the table is "Counts of the Number fo Unknowns for Variables in the George Charging and Sentencing Study."

Q. And could you identify that table for us, please?

A. Yes. This is another table I prepared yesterday which counts the number of missing values indicated for the variables from the questionnaire items for the charging and sentencing study.

Q. Was that prepared from the most recent tape you

have?

A. Yes, from the August 8 tape.

MS. WESTMORELAND: Your Honor, we would submit into evidence Respondent's 18a, referring to unknowns in the charging and sentencing study data at this time.

THE COURT: Let me make sure I understand it. How many cases were in the sample in the Georgia charging and sentencing study?

[1432] THE WITNESS: There were 1082 cases.

THE COURT: Is this a count, let's go down to plea bargain, which has had some discussion, which is LDF-40.

You show 445 unknowns. Does that mean that out of 445, excuse me, out of one thousand plus questionnaires, the plea bargain foil was not filled in in 445, or is that

expanded to represent the universe?

THE WITNESS: I believe this particular unknown designation is the result of a code that was represented for that question, which I think was a zero code. And there was no explanation as to what that signified in the questionnaire.

THE COURT: I'm not sure I asked the question

right.

What I want to know, does this mean to me that from the thousand plus questionnaires, there were 445 where that code was unknown, regardless of how it was coded?

THE WITNESS: Yes, of the-

THE COURT: On the basis of the universe of 2500? THE WITNESS: No, I do not have information about specific plea bargain concerning the whole universe.

THE COURT: You didn't use their weighting?

THE WITNESS: No, I did not.

THE COURT: To expand on a stratified sample or any other basis. This is just a raw number?

THE WITNESS: Yes, Your Honor.

THE COURT: To say it another way, that would mean that [1433] about forty-five percent of those questionnaires had no information on plea bargain.

THE WITNESS: Yes.

THE COURT: All right.

MS. WESTMORELAND: We submit it, Your Honor, and ask that it be admitted at this time.

THE COURT: All right, Mr. Ford.

MR. FORD: Could I ask just a couple voir dire questions, Your Honor?

THE COURT: You may.

#### VOIR DIRE EXAMINATION

#### BY MR. FORD:

- Q. Again on the label, "unknowns," is this what came off the tape, not the questionnaires, is that correct, these numbers?
  - A. These came off the tape, yes.
- Q. And you don't differentiate here between the foils that are coded 1, 2, blank, "U", and the ones that are coded in other fashions, is that right?
  - A. That's correct.
- Q. And where it indicates that some of the matters are undetermined, is that the places where there are foils and there was no information as to whether there might have been more—
- A. There was no specific entry as to what "unknown" represents. There was no "unknown" entry that I could—THE COURT: Count.

[1434] THE WITNESS: Count, yeah.

## BY MR. FORD:

Q. And am I correct those are both in the foil situation?

A. Yes.

Q. Is that where both of those come in?

A. Yes.

MR. FORD: Again, Your Honor, with the reservation that our position will be ultimately that this is not rele-

vant, I have no other objection at this time.

THE COURT: Well, I'm not in position to assess its statistical significance, but I think it is relevant as reflecting on the completeness of the data base, so I will admit it.

MS. WESTMORELAND: Thank you, Your Honor. THE COURT: I might note in that ruling that some, I don't mean to infer that I think that all of these ought to be zero. Some of these are measuring things, well, no, excuse me, these are unknowns, these are not present. All right, I'll admit it.

## BY MS. WESTMORELAND:

Q. Doctor Katz, did you conduct a similar type of accounting, counting procedure in the charging and sentencing study and the procedural reform study for the items that you previously discussed as "other" items, the provisions in the questionnaire for an "other" designation?

[1435] A. Yes, I did.

Q. Could you refer to what has been labeled Respondent's Exhibit 19, and which also, I believe, has Tables Roman Number 2A and Tables Roman Number 2B on

that exhibit and identify that for us, please?

A. Yes. This is Table 2A, "Counts of the Number of 'Other' Items of Variables in the Procedural Reform Study" which I prepared and counted the number of cases in which an "other" designation was given as one of the foils for the procedural reform study, and counted the number of cases where "other" was indicated as an item for the charging and sentencing study.

Q. That is-

0

A. So, for example, for the procedural reform study, I give the relevant question that's being referred to in the lefthand side column.

Then the second column I give the item number representing "other" response.

Then I give the number of cases in which that "other" response was designated.

And then I give a short description of the variables

that the question is trying to relate to.

Q. So, do the columns under "question", then, refer to specific question or question numbers or response numbers in the questionnaire itself?

A. Yes.

[1436] Q. And where did you obtain these "other" information from, from the tape or from other items?

A. This particular table was done in terms of the

tape I received in late January.

And Table 2B, I also counted the number of "other" cases for the charging and sentencing study, and generally there were two ways in which "other," "others" could appear. One as a particular distinct item, as is indicated in certain of these variables, and also "other" can appear as an option in one of the two foil questions.

And so on the lefthand side of the first column I refer to the particular item designation in the charging and

sentencing study.

Then I give the count of the number of cases in which "other" was indicated.

Then I give a short description of the variable related to that.

Q. Did you make any examination of the data, the data base and the information you received, to determine if variables had been defined for the specific items?

A. Yes. And I could not see how any of this informa-

tion was utilized, except in rare cases.

For the most part, this information was not put on the computer variables for the computer tape, and as far as I can tell, was not utilized in any analysis.

[1437] THE COURT: Let's be a little more precise about that.

Looking down at the charging and sentencing study, Mr. Boger, let me make sure I'm clear on something.

There are very few of Professor Baldus' tables that rely on the first study, is that correct or incorrect?

Mr. Boger: That's correct, Your Honor.

THE COURT: So we're primarily interested in the charging and sentencing study and secondarily on the triangulation notion of the other—

MR. BOGER: That's right, Your Honor.

THE COURT: Is that a fair statement of your-

MR. BOGER: I do think that's right. The place where the procedural reform study has the most relevance, of course, in the charging decisions, the decisions that take the case on to a penalty phase, and the decision of the jury at a penalty phase.

As to those, it represents the complete universe of cases in the time period that we're looking at. And almost all the "other" input is on charging and sentencing—

THE COURT: All right. Now let me ask you a few

questions.

I notice that you have a 139 "other" responses in the

variable "special aggravating features of offense."

Is it your testimony as to that item that that "other" data was not used in subsequent analysis.

[1438] THE WITNESS: That's correct. I do not recall any particular subdivision of these "other" items in terms of additional aggravating features that were defined in the computer codes.

THE COURT: Well, my question is, was the data

utilized at all?

THE WITNESS: As far as I can recollect, no.

THE COURT: Would that also be true with victim mitigating circumstances?

THE WITNESS: I believe there was occasionally a question dealing with whether or not victim mitigating

circumstances were present or not, where this particular item was included with perhaps 13 or 14 other items.

But there was no attempt to break down the information contained in this response, LDF-306.

THE COURT: How about contemporaneous offense? Do you know if that was used?

THE WITNESS: I believe it was used in certain ways, but some of these "other" responses related to either other felonies or other misdemeanors, and I believe that that information was included in certain general variables relating to those areas.

THE COURT: How about defendant's motive?

THE WITNESS: I do not believe any of the defendant motive "other" items were utilized.

#### DR. JOSEPH L. KATZ

#### (DIRECT)

[1440] Q. Doctor Katz, in evaluating the data base, the data bases that you had available to you, did you do any comparisons between the two studies, that is, the Procedural Reform Study and the Charging and Sentencing Study?

A. Yes, I did.

There are 361 cases which have the same case numbers between the Charging and Sentencing Study and the Procedural [1441] Reform Study.

And in trying to evaluate the consistency of the data, I looked at variables that seemed to be related, closely related between those two studies to see how they were coded between the two studies for the same cases.

Q. And how did you make that determination, or what did you do in making that examination?

A. I merged the two files so that I could directly compare the 361 cases, and for a sample of about 30 or so variables that I've listed in the Table, I—

Q. And you mentioned Table, would you refer to Respondent's Exhibit 20A, which is a document that is not in the notebook at this time, and-

Yes. This is a table I prepared yesterday.

- What's the heading on that table? Q. "Table of Non-Match Counts."
- And was that prepared from the most recent tape Q. available to us?

Yes, it was. A.

A.

Would you explain what you did in preparing this Q. table?

In preparing this table for the variables described, Α. I, for a particular case, I determined whether the outcome for that variable was the same. And if the outcome was not the same, I designated that a non-match.

And then for the cases, I then counted the number of

[1442] non-matches for these particular variables.

On the lefthand side after description of the variable that's being represented, the second column gives the total number of non-matches that were found.

The third column gives the percent of the 361 cases

that these non-matches represent.

The fourth column gives the procedural reform study

variable that I utilized.

And the fifth column gives the charging and sentencing variable that I utilized to compare for this particular variabl.

Q. You indicated that you compared to see if the re-

sponses were a non-match.

What particular things were you comparing? If my recollection is correct, the procedural reform study had in certain cases a yes or no type designation whereas the charging and sentencing study had a provision for four specific responses.

How did you make that particular comparison?

A. I was particularly concerned with the ultimate way in which this variable would be classified. And in the charging and sentencing study, I, I coded things in terms of how Professor Baldus had ultimately coded this variable. And that is using his convention of designating "U's" and blanks to be zeroes, and 1's and 2's to be

coded as 1 for a particular variable.

[1443] In the procedural reform study variable, I used the, specifically the variable that is indicated, in that these are for the most part, zero—1 variable, zero indicating that the variable is not present in the case, 1 indicating that it is present.

So I was matching, or testing matches for what ultimately I believe was used in the analysis by Professor Baldus.

- Q. In making these comparisons, how did you determine which particular variables or which particular items to compare?
- A. I tried to pick items that were almost precisely defined the same in the two questionnaires, and to eliminate any judgment on my part, I listed the statutory aggravating circumstances, and then, for example, an item like slashed throat, would be, that option would be the same for the charging and sentencing study and the procedural reform study questionnaire. The indication would be slashed throat.

So I compared whether a case had that attribute coded or not. So the "12" indicates there were twelve cases where the codings were not identical out of the 361 cases.

- Q. In making these comparisons, did you make any legal judgment or any other kind of judgment as to what would be equivalent?
- A. I tried to restrict this to questionnaire items in which no legal judgment would be required, other than perhaps a judgment, assuming that homicide, at the time of the homicide, is the same [1444] as the time of the killing. Those kinds of word changes.

I tried to make these items, these variables that I've listed, the items that are the same between the procedural reform study and the charging and sentencing study in the way it's designated on the questionnaires.

MS. WESTMORELAND: Your Honor, at this time, we would like to submit Respondent's Exhibit 20A, the table of non-match counts, into evidence, for the purpose of illustrating that there are at least apparent inconsistencies between the two studies.

I don't believe Doctor Katz is indicating either one is necessarily right or wrong in his judgment. He's just indicating he's done a computer count and found these inconsistencies. And for that purpose we would like to

ask that it be admitted.

THE COURT: Mr. Ford?

MR. FORD: Could I have a couple questions, your honor?

THE COURT: All right.

#### VOIR DIRE EXAMINATION

#### BY MR. FORD:

Q. Doctor Katz, what source did you use, then, to determine whether or not the variables were equivalent between the two studies?

A. The questionnaire, the descriptions on the ques-

tionnaires as to those variables.

# DR. JOSEPH L. KATZ

## (DIRECT)

[1447] Q. Doctor Katz, moving into, past the data and past the questionnaires themselves, did you do an analysis or did you evaluate the approaches utilized by Professor Baldus in analyzing the data in the procedural reform study?

[1448] A. Yes, I did.

Q. And what approach did you take in your evaluation of these analyses?

A. I considered, after, after reading his early documents that were given to me, I had concluded that his hypothesis was a statistical hypothesis based on a level of aggravating and mitigating circumstances. In black victim cases and white victim cases.

To restate it, I believe it goes, Professor Baldus believed that the higher level of aggravating circumstances and a lower level of mitigating circumstances are tolerated in the Georgia charging and sentencing system for black victim cases, Father than white victim cases, before higher sentences are imposed.

- Q. And where did you obtain that particular hypothesis?
  - A. That was stated in the preliminary report. So,-
  - Q. Was that a document you received in-
- A. That was a document I received in November, 1982.
- Q. And so did you proceed, based on that particular hypothesis to do any analysis?
- A. Yes. I wanted to directly test that hypothesis, and the first thing I did was determine what Professor Baldus or tried to determine what Professor Baldus believed were aggravating and mitigating circumstances.
- Q. Would you refer to a document that's labeled Respondent's [1449] Exhibit 23, Table Roman Number Six, and identify that document, please?

A. Yes. This is a-

THE COURT: Wait just a second, you're getting ahead of my absorption rate.

MS. WESTMORELAND: I apologize, Your Honor.

THE COURT: Give me that hypothesis again, the Georgia system tolerates higher levels—

THE WITNESS: Of aggravation and lower levels of mitigation in black victim cases, rather than white victim cases, before higher sentences are sought or imposed.

[1453] Q. Doctor Katz, I would like to refer you now to, if you would look to Respondent's Exhibit 25, which

is Table 8, and identify that document, please?

A. Yes. This is a document which I prepared in which I compared white and black victim cases in the procedural reform study in terms of all the variables that were defined in table six.

Left-Hand column I have the variable.

Q. By Table 6, you mean Respondent's Exhibit 23?

A. Yes.

Which is the list of the variables.

On the lefthand side are the variable names, whose in-

terpretation is given in Table 6.

The second column is the number of white victim cases out of the total number of white victim cases that had the particular attribute.

The third column, labeled percent, gives the percentage of cases, white victim cases that had the attribute, ag-

gravated battery.

Fourth column, labeled black victim, then does a similar count for black victim cases, and out of the 247 black victim cases 10 had aggravated battery.

The fifth column gives the percent related to that, the

black victim cases.

Table, excuse me, Column 6 then gives the percent [1454] difference calculated by taking the percent of white victim cases minus the percent of black victim cases for that particular variable.

And then the last column is the "Z" value.

O. And what is the the "Z" value?

A. The "Z" value is a standardized measure by which one could determine the probability that the observed percent differences are due to random chance.

Q. And would you refer then back to Respondent's Exhibit 24, Table 7, and identify that table, please?

A. Yes. In my analysis, I will be using the "Z" value frequently, and in the hypotheses that I will test, I will use the measure at the .05 level of significance.

However, in Respondent's Exhibit 24, I give a list of possible "Z" values, and the corresponding "P" values, or significance let hat would be associated with those "Z" values.

It's difficult to compute a particular "P" value, given a high "Z" value, since the tables generally only give "Z" values up to 3, sometimes even 4.

This allows one to put the "Z" value in perspective. So a "Z" value that is greater than 3, one can get some idea as to the relative significance of that value.

Now, I have positive "Z" values in Respondent's Exhibit 24 and negative "Z" values.

[1455] Q. Did you make the calculations involved in this table?

A. Yes. These calculations are approximate. It is very difficult to exactly determine what those probabilities are, but they are approximate.

Q. Did you do this by some standard formula that's utilized by statisticians or how did you compute these?

A. I computed these by noting that based on some mathematical theorems a certain coin tossing experiment can be related to the calculation of "P" values for "Z" distribution, and given that knowledge I was able to approximate what these "P" values are.

Q. And is this what you utilized in your later analyses, in determining statistical significance?

A. Yes. The important "Z" values, however, are the "Z" values of plus 1.645, and minus 1.645.

Q. And why are those important?

A. If we get a "Z" value of plus 1.645, that will mean that at the .05 level of significance, white victim cases have more of that attribute than the black victim cases.

If we achieve the "Z" value of minus 1.645 or less, that will mean that black victim cases had more of that white victim cases at the .05 level of significance.

MS. WESTMORELAND: Your Honor, merely for the purposes of illustrating the values Doctor Katz used in

his later analyses, I would submit Respondent's Exhibit 24 at this time.

MR. FORD: No objection, Your Honor. [1456] THE COURT: It will be admitted.

#### BY MS. WESTMORELAND:

Q. Doctor Katz, referring back to Respondent's Exhibit 25, and then also, if you would look at the next document labeled Respondent's Exhibit Number 26, which is Table 9, what are the differences in these two tables and would you identify first Respondent's Exhibit 26?

A. Respondent's Exhibit 26 is Table 9, is a comparison of white and black victim cases for the procedural reform study in which I selected variables from the previous table, Respondent's Exhibit 25, that show statistical sig-

nificance at the .05 level of significance.

For those variables, I then categorized them as to whether the "Z" values were positive, that means greater

than 1.645, negative, less than minus 1.645.

I then categorized them in terms of whether white victim cases showed more of that attribute or black victim

cases showing more of that attribute.

So for example, the variable armed robbery, we refer back to the Respondent's Exhibit 25, in the armed robbery case there were forty percent of the white victim cases in which an armed robbery was a contemporaneous offense and there were 18.2 black victim cases in which armed robbery was a contemporaneous offense.

Q. 18.2 percent?

[1457] A. Percent, yea, the difference was 21.8 percent, and the "Z" value associated with that, was 5.693. So the indication of armed robbery 5.693, refers to the previous table where armed robbery—

Q. You mean in Respondent's Exhibit 26, that indi-

cation?

A. That indication is that white victim cases have a higher proportion of armed robbery present than black victim cases, and it's significant at the .05 level of significance.

Q. And is that the representation made in both of these tables, as your calculations?

A. Yes, it is.

For the total variables, however, I utilized a slightly different approach. Since these were not attribute variables, I compared mean differences.

THE COURT: Wait just a minute, now. What—if I go over to about the third page, do I pick up the first total variables?

THE WITNESS: Yes, Your Honor.

THE COURT: Okay.

THE WITNESS: As an example, under the category, special aggravating features of the offense, I have the variable AGGCIRX, which counts the number of aggravating circumstances present at the offense out of a large list of possible aggravating circumstances, and the mean number overall, the white victim cases was 2.831. The aggravating—excuse me, Your Honor.

[1458] THE COURT: I'm not with you in terms of where you are.

What page are you on?

THE WITNESS: Third page of Respondent's Exhibit 25, Your Honor.

THE COURT: All right. About where on the page?

THE WITNESS: The middle of the page.

THE COURT: All right. Heading?

THE WITNESS: Special Aggravating Features of the Offense.

THE COURT: Okay. I see it.

THE WITNESS: AGGCIRX is the variable name. The mean number of aggravating circumstances overall white victim cases, is 2.831, and the mean number of aggravating circumstances overall black victim cases, is 1.964.

And the mean difference is calculated and the "Z" value associated with this mean difference is presented.

## BY MS. WESTMORELAND:

Q. And then did you make the same determinations for those particular variables in accumulating the information on Table 9?

A. Excuse me, would you repeat the question, please?

Q. Yes. We talked about the attribute variables. With regard to the total variables, did you also take the significant "Z" values and move them to Table 9 as well?

A. Yes, I did.

Q. Did you make any kind of determination or judgments in [1459] creating Table 9 from, I'm sorry, Respondent's Exhibit 26, from Respondent's Exhibit 25?

A. No. I simply selected those variables that were significant at the .05 level of significance, and the classifications had already been provided for in Table 6 and I simply represented them in Table 9.

Q. And in making this representation in Table 9,

what is shown?

THE COURT: Now, wait a winute, what is Table 9? MS. WESTMORELAND: I'm sorry, Your Honor. Respondent's Exhibit 26.

THE COURT: Is that what we've been looking at? MS. WESTMORELAND: It's the second of the two tables, Your Honor.

THE WITNESS: It shows there are a lot of variables, aggravating variables in which white victim cases have a higher proportion of that variable than black victim cases.

And there are a great deal of variables in which, pardon me, mitigating factors, in which black victim cases have a higher proportion or a higher average number of those mitigating factors, than white victim cases.

[1484] Q. Could you please describe or tell us what the purpose of an index method in general is?

A. The purpose of an index method is to devise some standard by which observations of cases will be judged for the purpose of ranking these cases appropriately.

Generally an index is an artificial measure of some process in which no easily obtained measure is available to, to allow for that process or to measure that process.

Q. And what does the index method determine? What

is developed by these indexes?

- A. The purpose of the index is to rank different cases, or different observations so that one could conclude that perhaps one case was, had more of that attribute or more of that measure than another case.
- Q. What kind of outcomes are determined by the index method?
- A. The index method is trying to provide an artificial ranking.

In this case, the indexes were used for, an index trying to control for aggravating and mitigating circumstances. So the outcomes would be numbers that purport to represent the degree or level of aggravation and mitigation in each case for the purpose of ranking these cases according to those numbers.

THE COURT: I understand the concept, but it is not clear to me as what indices of Professor Baldus' does this [1485] address.

## BY MS. WESTMORELAND:

Q. Doctor Katz, could you address—are you— THE COURT: Or which.

## BY MS. WESTMORELAND:

- Q. Doctor Katz, are you addressing particular indices at this point or the index method in general?
  - A. At this point the index method in general.
- Q. And have you addressed any specific indices and analyzed any of those particular indices?
  - A. Yes.

MS. WESTMORELAND: I think, Your Honor, at this point the purpose is merely a general discussion of the index method.

## BY MS. WESTMORELAND:

Q. Does the index method utilize a predicted outcome or an actual outcome or what type of value in that regard?

A. There are many different ways one can construct an index. Professor Baldus has used regression analysis

to develop his indices.

What he, what I believe he has done is he has run regression analyses and used a predicted outcome which were the result of the regression analysis to form his index for aggravation and mitigation.

Q. What would be the difference in a predicted out-

come and an actual outcome in that context?

[1486] A. The actual outcome is the outcome that has

been observed for the particular variable.

The regression provides a model for that actual outcome, and from that model, will give a predicted outcome, based on the independent variables that it has to work with.

Q. Would you refer to Respondent's Exhibit 39, which is Table 21A, Doctor Katz, and identify that document,

please?

A. Yes, Respondent's Exhibit Number 39 gives a series of regressions that I ran for the first one hundred cases in the procedural reform study.

THE COURT: Huh?

THE WITNESS: For the first one hundred cases in the procedural reform study.

## BY MS. WESTMORELAND:

Q. Are these regressions that you developed or how were these regressions obtained and what was the purpose of doing this?

A. The purpose—

THE COURT: Excuse me. What table are you on? MS. WESTMORELAND. Table 21A, Your Honor, Respondent's Exhibit 39. It should be in the notebook.

THE COURT: All right.

THE WITNESS: The purpose of these regressions is to show how the index method can be shaped to give different rankings for, for different cases. These regressions are only for the purpose of demonstration rather than as a measure of an [1487] actual aggravation-mitigation index.

Q. Is this-go ahead. I' sorry.

A. And I limited it to a hundred cases so that the number of observations that I would have to tabulate in the tables would be limited to only a hundred and not burden me and others with all 607 observations.

So for purposes of illustration, showing how the index method would respond to Professor Baldus' use of predicted outcomes.

Q. And then in relation to this, and what you have done with this particular table, could you explain how the regression fits into the index method?

A. Yes. If we look at the regression under the title "Regression 1" as an example, this is a regression which results from using the variable X481C, which is a variable for whether or not a death sentence was imposed. As a dependent variable, and the use of six different variables representing aggravated battery, aggravated motive, and so forth.

Now, regression analysis tries to explain or model the dependent variable, in this case, being the death sentence outcome, by the independent variables that it's given. And it does this by trying to make the predicted outcomes, which are the outcomes that would be obtained for each of the individual one hundred cases after applying these weights in terms of what features of the offense were present in those cases, and summing [1488] up

these weights and trying to have these weights as close as possible to the actual outcome.

So for example, if we had a death sentence case, the value for X481C would be 1, and if in that death sentence case was present an aggravated motive and burglary, which is B-U-R-G-A-R-S, as the two variables, then the predicted outcome for that case would be .10; the constant term, nothing, no weight would be added in terms of the aggravated battery variable, A-G-G-B-A-T-T since it did not occur in this particular case, then .35 would be added for the aggravated motive variable, A-G-G-M-O-T, and .38 would be added for the burglaries variable, B-U-R-G-A-R-S.

The other three variables would have zero values and so those witnesses wouldn't be counted. So the resultant predicted outcome for this particular case, would be the sum of .10 plus .35, plus .38, which I believe is .83.

Now, the criterion by which these weights are assigned is based on the criterion that overall observations choose the weights or co-efficients that minimize the sum of the differences between the predicted outcomes and the actual outcomes, squared.

The reason the squaring procedure is employed is to, is the same reason that's used in the computation of variance, so that we're minimizing the sum of positive values and we don't have positive and negative values cancelling out.

[1489] Q. In this particular experiment that you've conducted, what is the significance of the later regressions that you've listed or provided?

A. The later regressions are regressions where addiditional variables were added to the set of independent variables, and for the purpose of raising the R-squared value.

Q. I notice you utilize R-square in each of these regressions, and we talked about R-square in some of the other witnesess' testimony.

Could you give a brief explanation of R-square and its significance?

A. The R-squared is a measure of how close the predicted outcomes reflect the actual outcomes, and it's essentially the proportion of variation of, as explained by the regression model in its predicted outcome, in terms of the actual outcome, in terms of the variation of the actual outcome.

The purpose of regression is to try and make the predicted outcomes be as close as possible to the actual outcome. If one is successful in doing that, one might say they have a regression equation that models the system, and hopefully has variables and co-efficients that represent the relative importance of these variables to the system.

The R-squared is a measure of how successful one has been in having the predicted outcomes become very close to the actual outcome.

[1490] The higher the R-squared, the closer the predicted outcomes are to the actual outcome over all the cases that are being considered.

Q. Let me backspace just a moment.

What is the difference between an adjusted R-squared an unadjusted R-squared?

A. A unadjusted R-squared does not take into account the number of variables that are used in the set of independent variables. It's, the unadjusted R-squared is not truly a measure of the variance, the explanation of the variance. That's what the adjusted R-squared does. But the unadjusted R-squared is generally utilized because we have a convenient test to test the significance of that R-squared value.

Generally these values are approximately the same. If you have a large number of variables in your model as compared to the number of observations, then the adjusted R-squared could be significantly lower than the unadjusted R-squared value.

Q. Why might that occur?

A. Because the adjusted R-squared value is truly a relative proportion of variance rather than variation of sum of squares.

For most models, if the number of independent variables compared to the total number of observations is a very high percentage, the unadjusted R-squared and the adjusted R-squared will have comparable values.

Q. I believe you were discussing the specific regressions that [1491] you had listed in your experiment, and the purpose of these additional regressions.

What is the purpose of regressions 2 through 5 and what do they show in regard to regressions in general?

A. Professor Baldus has employed his index method by utilizing the predicted outcomes for a particular regression.

I believe the statistical significance or meaning of this index has to be put in terms of how the rankings that result from predicted outcomes can be affected by a set of independent variables that's used in the regression model.

Furthermore, I also point out that as the R-squared value increases, what results are index values that rank death sentence cases close to 1 and life sentence cases which have zero values for X481C close to zero.

Q. And then do you, would you look at respondent's Exhibit 40 and identify that document please?

A. Yes. This is a Table I prepared in which I compared the predicted outcomes for each of the regressions indicated on Respondent's Exhibit Number 39.

The first category of cases are the life sentence cases. Now I selected the first one hundred cases from the procedural reform study and listed on the lefthand side under "case" the case number.

Then I list the actual sentence outcome and for life sentence cases they all should be zero.

[1492] And then I list the predicted outcome that would be generated by Regression 1 and Regression 2, and Regression 3, and Regression 4 and Regression 5. Q. And what, I'm sorry, go ahead.

A. The second page contains a continuation for the life sentence cases, with the appropriate index predicted outcome demonstrated.

And then the third page is the predicted outcomes for the death sentence cases for each of the five regressions.

Q. Could you explain the significance of these tables in light of the experiment you're discussing that you ran?

A. When Professor Baldus ran his regression analysis and built his indexes, he noted that there were many cases that had predicted values somewhere in the middle.

Q. By in the middle, what do you mean?

A. Mid-range cases, cases where there were death sentence cases that were close to .5 or lower; life sentence cases that were close to .5 or larger, and he interpreted this to mean that the system had a difficult time discriminating between these cases as to whether a death sentence should be applied or not.

Q. And how does your experiment relate to that?

A. Well, from my analysis, it appears that this, this mid-range of cases can be eliminated as long as one has a regression model in which the R-squared is sufficiently high.

Q. Could you give an example by looking at Respondent's Exhibit [1493] 40 what you're referring to?

A. Yes. If we look at say Regression 1, in this case, according to Respondent's Exhibit Number 39, it—

THE COURT: What page are you looking at?

THE WITNESS: Table 21A. Your Honor.

THE COURT: Page? Respondent's Exhibit 40?

THE WITNESS: Yes, and Respondent's Exhibit 39.

## BY MS. WESTMORELAND:

Q. Okay, which particular page of Respondent's Exhibit 40 are you referring to, Doctor Katz?

A. The first page of Respondent's Exhibit 40.

If we look at the predicted outcomes for these cases, utilizing Regression 1, which R-squared was .26, we see

a wide variation of the possible index values.

And looking at page 2, down the first column, there's again a wide range of values. Some of these values even achieve a predicted outcome of .70 as in the case of Case Number 066 at the bottom.

Q. By a wide range of values, could you give us an

example in the table what you're referring to?

A. Well, some of these predicted outcomes have values as low as —.23 and other cases have predicted outcomes that are as high as .70.

Q. Would you take a specific case and explain what

you're referring to, please?

[1494] A. On the second page of Respondent's Exhibit 40, Case Number D11, has a predicted outcome of —.23.

Q. That's with which regression?

A. That is for Regression Number 1.

Q. Out of Respondent's Exhibit Number 39?

A. Yes. Whereas Case 066 has a predicted outcome of .70. If we look at page 3 of Respondent's Exhibit 40, where we look at the index values or predicted outcomes for the death sentence cases, we again see a wide range of values. There are cases such as Case Number Z15 in which a predicted outcome of .100 is indicated, and there are cases in which a very large value is indicated, such as Case Number D18, with a .90 value.

Now, there are some life sentence cases which have higher index values than death sentence cases, and there are some death sentence cases that have lower, that have lower index values than life sentence cases.

The point is that there is a middle range of cases where life cases and death sentence cases are mixed up in terms of the predicted outcome index values.

This has been-

THE WITNESS: On Regression 1 or across the board? THE WITNESS: On Regression 1, Your Honor.

#### BY MS. WESTMORELAND:

Q And how does that, does that change in any way in the subsequent regressions that you utilized in your experiment?

[1495] A. Yes. I then ran Regression 2, where I added additional variables to the set of independent variables and achieved and R-squared of .59 as indicated on respondent's Exhibit Number 39.

Then I listed the predicted outcomes for index values that would be associated with the results from Regression 2.

And what I observed is that the amount of differences between the numbers are less.

Q. Between which numbers?

A. Between the index numbers for predicted outcome numbers for the life sentence numbers. They tend to be closer to the zero value, which is their, the sentencing outcome we're trying to predict, although there are some cases that do have large index values.

Then if we look at the death sentence cases on page 3 of respondent's Exhibit 40, we find that the index values for these cases tend to be larger, although there are still some cases which have low index values as compared to the life sentence cases.

So even in this regression, we would have a set of cases in the middle in which we would have death sentence cases having lower index values than life sentence cases.

So this regression has not completely separated out the life and death sentence cases.

If we move on to Regression Number 3, from Respondent's Exhibit Number 39, I've added additional independent variables.

[1496] THE COURT: I have the point. I figured out what happens as you go across.

Let me ask, what is included in Regression 1 and what is included in Regression 5? Anybody able to tell me? Have you, let me ask this.

Looking at 39, you've got a number of independent variables, such as aggravated battery, aggravated motive, burgars, which I suppose means burglary; or burglary-arson.

THE WITNESS: Burglary or Arson, Your Honor.

THE COURT: Okay. I don't know what the next one is. Anyhow, using the same independent variables on Exhibit 40 for Column 1 for all the cases?

THE WITNESS: Yes.

THE COURT: What have you, have you put in your model. Regression 5? Do you know what those mean?

THE WITNESS: Yes, Your Honor.

THE COURT: What is "bright?"

THE WITNESS: The defendant had an I.Q. of one hundred or greater.

THE COURT: All right, and that's burglary-arson.

What is "defem?"

THE WITNESS: The defendant was female, Your Honor.

THE COURT: "Dull?"

THE WITNESS: I believe that's the defendant had an I.Q. between, or less than 65, Your Honor.

[1497] THE COURT: "Kidnap" means that-

THE WITNESS: The kidnapping has a contemporaneous offense to the homicide.

THE COURT: And "mulsch" is multi-shooting, I believe.

THE WITNESS: Multiple shots to the head.

THE COURT: And the next one, "mutil?"

THE WITNESS: "Mutil" is mutilation.

THE COURT: Mutilation. What does "noarrest" mean?

THE WITNESS: I believe the motive for the killing was to resist arrest or not to be arrested.

THE COURT: What is "nokill"?

THE WITNESS: Defendant was not the trigger man.

THE COURT: And "nonperm"?

THE WITNESS: The motive for the crime, for the killing was a nonprofit crime motive.

THE COURT: Next one?

THE WITNESS: No violent personal crimes.

THE COURT: Old victim?

THE WITNESS: The victim was 65 or older.

THE COURT: Statutory aggravating circumstances?

THE WITNESS: Yes, sir, Your Honor. THE COURT: Rape. Serious crime.

THE WITNESS: Yes, Your Honor. Total number of serious crimes.

THE COURT: Connected with, or prior record.

[1498] THE WITNESS: Prior record, I believe.

THE COURT: What is the "STMIT2"? Statutory and mitigating?

THE WITNESS: I believe that's what it is, Your Honor.

THE COURT: Two victims. The violence was unnecessary to carry out the felony.

THE WITNESS: Yes, Your Honor.

THE COURT: It was an urban case.

THE WITNESS: Yes, Your Honor.

THE COURT: The victim was a criminal.

THE WITNESS: Or criminal record. THE COURT: What is "VICDEFS?"

THE WITNESS: The victim was defenseless.

THE COURT: What's that next one?

THE WITNESS: Victim was a policeman or fireman.

THE COURT: What is "VICPLEA," pled for mercy?

THE WITNESS: Yes, Your Honor.

THE COURT: The next one?

THE WITNESS: I believe that's the number of victim mitigating circumstances—something to do with victim mitigating circumstance. I believe the number of them.

THE COURT: What's the next one?

THE WITNESS: Whether or not a violent personal crime had been in his prior record, the defendant's prior record.

THE COURT: And the next one?

[1499] THE WITNESS: The number of violent personal crimes.

THE COURT: In the victim's prior record?

THE WITNESS: Yes, sir. Excuse me, in the defendant's prior record.

THE COURT: It says the per crime?

THE WITNESS: I believe that's violent.

THE COURT: Okay. The next one?

THE WITNESS: That distinguishes whether or not a precipitating event occurred at the time of the homicide.

THE COURT: And premeditated, I guess.

THE WITNESS: The killing was premeditated.

THE COURT: All right.

#### BY MS. WESTMORELAND:

Q. Doctor Katz, -

MS. WESTMORELAND: I'm sorry, Your Honor.

THE COURT: Go ahead.

#### BY MS. WESTMORELAND:

Q. Doctor Katz, did you utilize any specific method in choosing the factors to add into these regressions?

A. No. I simply wanted to demonstrate that as the R-squared increases, the actual, the predicted outcomes will become closer and closer to the actual outcomes.

And the purpose of this was to show that at any stage, what is happening with the regression in terms of the independent variables it has available to it, is that it is [1500] trying to weight the variables or assign coefficients to the variables so that the predicted outcomes for the life sentence cases will have zero values and the

predicted outcomes for the death sentence cases will have one value, regardless of the independent variables that it has to work with.

MS. WESTMORELAND: Your Honor, at this time, I would like to submit Respondent's Exhibits 39 and 40 to illustrate Doctor Katz' testimony as an experiment he has conducted and for that purpose only.

MR. FORD: Certainly as an experiment, we would object, Your Honor. This is as I understand it, is not the whole data set. This is not on the data in this case,

this is a hand picked sample.

I'm still not clear as to how Doctor Katz came up with these variables, whether he threw at a dart board, let the computer choose them or what. But it doesn't seem to me, this is a purely illustrative thing to say something about regression equations in general, and how they work on small, manageable data sets. I don't know that this is an experiment that has anything to do with this case. I certainly object on this foundation.

MS. WESTMORELAND: I believe I asked that it be introduced to illustrate Doctor Katz' testimony in this regard, and perhaps "his experiment" is not a very good

choice of words.

[1501] THE COURT: Well, experiment in the interrelationship of number variables and R-square, yes; experiment to demonstrate anything about the entire data set, no.

MS. WESTMORELAND: That's not the purpose, Your Honor. It's to illustrate the testimony concerning R-squareds and regressions.

THE COURT: For that purpose, it's admitted.
MS. WESTMORELAND: Thank you, Your Honor.

#### BY MS. WESTMORELAND:

Q. Doctor Katz, how do regression equations react to errors in the predictor variables that may appear?

A. Well, the regression equations treat the information it has as only, ignores the errors and just goes by the rule of trying to minimize the sum of the square of the differences between the actual and predicted outcomes.

So if there are errors that are introduced into the set of variables, the regression that results from that analysis can be faulty and can be subject to a great deal of error.

- Q. What would be generally accepted statistical procedure in utilizing regressions insofar as treating unknown values?
- A. I believe there is a problem in using regression in the kind of analysis performed by Professor Baldus because there are a great deal of unknowns.

The unknown values were coded to have zero values, and the usual statistical method of dealing with unknowns is to omit [1502] those observations in the performing of the regression analysis.

It is hoped that when regression analysis is run that there are very few independent or dependent variables that would have missing values.

Since in the data set that Professor Baldus had available to him there were a great deal of missing values, and his regression had been performed where those values had been indicated as missing, using the standard convention of omitting observations in which even one missing value is indicated for an independent or dependent variable, there would have been very few observations left in which the analysis could have been conducted with.

THE COURT: Are you about to change subjects? MS. WESTMORELAND: Yes, Your Honor.

THE COURT: Let me ask you a couple of questions about that piece of testimony.

#### BY THE COURT:

Q. Do you understand, as do I, that a coding of "U" meant that there was some evidence in the file to indicate that that variable might be implicated in the case, but the coder was unable to make a conclusive determina-

tion and so he put a "U" there. It is not like not existent, in other words?

A. Yes, Your Honor. That's my understanding.

Q. So in giving the testimony, that is the understanding that you are operating on?

[1549] THE COURT: Particularly I'm interested in what if any observations he has on race of defendant effect.

THE WITNESS: That I believe, will be Respondent's Exhibit 61.

In Respondent's Exhibit 61, in which all cases are broken down by defendant-victim racial combination, there appears to be a pattern based on the defendant-victim racial combination effect. And if I can cite some of these categories, [1550] such as contemporaneous offense, and cite some of the numbers, when a black defendant kills a white victim, 67.1 percent of the time armed robbery is present.

When a white defendant kills a white victim, 20.2 percent of the time armed robbery is present.

6.6 percent of the time when a black defendant kills a black victim.

And 22.2 percent when a white defendant kills a black victim.

I computed some measures of significant differences, but that would have required many more tables and I've avoided them here, so I've left it overall as the percentages.

Then to cite a mitigating variable, perhaps page, Page 4 of this exhibit, under the category of special precipitating events, indication of of the relationship between defendant-victim racial combination.

The first variable represents barrom-lover quarrel, and it's spelled B-L-V-I-C-M-O-D, and in in this case, when black defendants kill white victims, only seven and a

half percent of time is this precipitating circumstance present.

When white defendants kill white victims, it's 43.6

percent.

When black defendants kill black victims, 65 percent. When white defendants kill black victims, it's 45.8 percent.

[1551] THE COURT: I can read the tables, but as to the death penalty on this analysis, whichever table that one is, did you observe any race of the defendant effect?

THE WITNESS: Overall, it appears to me that in reviewing this table, that black defendants killing white victims tend to have more aggravating circumstances and less mitigating circumstances than white defendants who kill white victimes. And in turn they have more aggravating circumstances and less mitigating circumstances in cases where black defendants kill black victims.

THE COURT: Now what? Where the victim is black,

which series is more aggravated?

THE WITNESS: When the victim is black, that generally refers to a case where a black defendant kills a black victim and overall this table suggests that's the most mitigated time of murder. That is suggested by the 471 cases where a black defendant kills a black victim, to 27 cases where a white defendant kills a black victim.

THE COURT: You said mitigating, you didn't say

infrequent. What are you looking at?

THE WITNESS: I'm sorry, Your Honor. I thought I was, you were—

THE COURT: I don't know what you're viewing. 61? THE WITNESS: Yes, Respondent's Exhibit 61.

THE COURT: Page?

[1552] THE WITNESS: What page?

MS. WESTMORELAND: Which page number of the exhibit is it, Dr. Katz?

THE WITNESS: Oh, excuse me. I guess all the pages I find give an overall impression of what the patterns of, are represented by these numbers.

THE COURT: Are you saying that a killing across racial lines usually results in a more aggravated less mitigated case, and killing along racial lines usually results in a less aggravated more mitigated case?

THE WITNESS: I don't think it generalizes quite like that.

I believe when a black defendant kills a white victim, that tends to be the most aggravated circumstance as compared to the other defendant-victim racial combinations.

Whereas it appears that the 27 cases where a white defendant kills a black victim, they don't appear to be as aggravated as when a black defendant kills a white victim, or as numerous.

#### BY THE COURT:

- Q. Well, obviously they're not as numerous. But your observation is it's not as aggravated?
  - A. Yes.
  - Q. How about mitigation? Which is more mitigated?
- A. The most mitigated of these defendant-victim racial [1553] combinations is when a black defendant kills a black victim.

### DR. ROGER L. BURFORD

(DIRECT)

[1635] In general, I don't believe that it is possible to prove in a strict sense anything either pro or con, by the use of statistics. You can provide evidence, for example, to the effect that there is discrimination or there is not discrimination, but this does not constitute proof in a strict sense.

Q. Would you explain what is meant generally by the concept of statistical significance?

A. Okay. Significance is a term that is used by statisticians rather broadly in a very specific sense. When it is said that, for example, a regression co-efficient is significant at a .05 level, what that says, essentially, is that the regression co-efficient that is observed is different enough from zero that it would be unreasonable to conclude that it is exactly equal to zero, but it actually says nothing about what the specific value of that regression co-efficient is, or, for example, if it said that the means of two, two arithmetic means are significantly different, all it's saying is that their difference is large enough that you could not say reasonably that the true means of that unknown universe are exactly equal.

It doesn't say anything about the substantive significance. It only says that they're not, or they could not reasonable be said to be exactly equal. Doesn't say how different they might be.

- Q. What is your opinion on the use of regression type analyses, [1636] or what problems are there with the use of regression type analyses in research or studies such as that involved in the instant case?
- A. Regression analysis is right now, I think, probably the most frequently used kind of statistical analysis in a wide range of types of problems, including studies on discrimination.

It probably is also the most frequently abused or misused methodology.

First of all, it should be recalled that simply because two variables are closely correlated or closely related to one another, that says nothing at all about causation.

There have been, for example, the old stories about the relationship between increases in Baptist preachers' salaries and increases in alcoholic beverage consumption. That doesn't necessarily imply that there is a causal relationship there.

Second, the results of the regression analysis or any other statistical analysis for that matter, can never be any more valid than the data that went into the analysis. You say, okay, garbage in, garbage out. If the data are not completely valid, then the results of the analysis are questionable.

Furthermore, it is possible, in fact even very likely that if you have a fairly large number of variables that are totally unrelated with each other, that are generated completely at random, that it is possible to derive a regression equation which has a reasonably good statistical fit in the sense of [1637] statistical significance and R-squares. I'm sure R-squares have been discussed here.

And yet, and even to have significant regression coefficients on most of the variables, and yet it's known in advance that these data are totally unrelated to each other.

Q. Would such a regression equation have any meaning?

A. It would have absolutely no meaning, and yet, there are fairly high co-efficients, fairly high R-squares. And yet no meaning at all.

In fact, I just saw a copy of a recent study that was done where precisely this thing was done. A, something like fifty variables were generated purely at random, and independent of one another, a hundred observations for each variable, and then a regression analysis was run on these, and a stepwise regression procedure was used.

First of all, all fifty variables entered into the analysis and a stepwise procedure was used to reduce the number of variables down to something like twenty, and the model looked like a real model with significant coefficients, significant R-squares and the whole thing, and yet the data were all totally fictitious and totally made up.

This is entirely possible with regression analysis and you have to be aware of it.

Q. You mentioned regression co-efficients and discussion has been had about that.

[1638] What is the meaning of the regression coefficient itself?

A. Ostensibly the regression co-efficient measures the impact of the particular independent or predicted variable on the dependent variable.

I say ostensibly because, excuse me, it ostensibly measures that impact, net of all other variables. And I say ostensibly because it does measure that impact net of all the variables if the independent variables or predicted variables are totally uncorrelated, totally independent of each other.

If, however, there is any degree of intercorrelation among the variables, the regression co-efficients are somewhat distorted by that interrelationship and do not measure exactly the net impact of that independent variable upon the defendant variables.

Q. In a case in which you might have intercorrelated variables, in the sense that you're referring to, what meaning, excuse me, what meaning or significance could you attach to the regression co-efficients obtained in that type of equation?

A. You would have to view them with very great caution, because they are almost certainly distorted.

In many cases, the signs would even be reversed from what they should be, or you may have zero co-efficients where there should be larger co-efficients or you may have large co-efficients where they should be essentially zero.

[1639] So, the interpretation of the co-efficients them-

selves is very fuzzy in the case of a high degree of multicolinearity, or even a small degree of multicolinearity they are distorted.

Q. What are the underlying assumptions behind, behind regressions and the use of a regression type of analysis?

A. Well, from a purely statistical point of view, if the regression analysis is to apply, ideally we would assume that all of the independent variables are totally independent of one another. That they are independent of the residual term, that is, the difference between esti-

mated values or predicted values and actual values of the dependent variable, the residual is normally distributed with a zero mean, and a constant variance at all levels.

This implies that the dependent variable is a continuous the normal term is normaly distributed, then this implies variable, that if, in fact, the independent variables are uncorrelated, and uncorrelated with the residual term, if the normal term is normally distributed, then this implies that the dependent variable is also normally distributed, which means it's a continuous variable over a fairly wide range.

Q. How far could one deviate, or is that something that's possible to answer, how far could you deviate from these assumptions and still have a meaningful regression?

A. It's hard to say. Regressions are run, generally, on, or very frequently, on data that don't meet all of the assumptions.

As a matter of fact, I guess most of the time, the data [1640] don't meet all of the assumptions, and exactly how far you can deviate without totally destroying the analysis is hard to say.

In the present case, the regressions that were run, the dependent variables were binary variables, zero—1 variables, generally, which certainly are not normally distributed.

In the present case, all or most all, if not all, of the independent variables were categorical type variables or binary variables, which doesn't necessarily cause you problems, and in the present case, there is certain to be a fairly high degree of multicolinearity among a large number of the variables, including race of victim and various aggravating or mitigating circmumstances, as I think the tables that I saw that Doctor Katz had done indicated that there would be a fairly high degree of relationship between, say, race of victim and many of these aggravating and mitigating circumstances.

Q. Could this multicolinearity problem be accounted for by use of a factor analysis?

A. If a factor analysis is run that includes, well, of course, we do have problems with the factor analysis

there, too, but I'll comment on that in a moment.

But if the factor analysis includes the race of victim and the race of defendant variables, that is, if it includes all of the dependent, excuse me, all of the independent variables in the analysis, as well as the dependent variables in the analysis, then it is possible to take account of and correct for [1641] multicolinearity.

However, if the dependent variable and key independent variables were not included in the factor analysis, then nothing actually has been done, because the factor scores themselves are highly correlated with certain of the independent variables that were not included within the factor analysis.

THE COURT: Wait a minute. I don't understand what you just said, and I want to. But let me make a

little note, first.

#### BY THE COURT:

Q. Could you tell what you just said again in layman's terms?

A. Okay. A factor analysis can be used to derive a set of variables, sometimes referred to as latent variables or unobserved variables from the set of independent variables, and these latent variables are not correlated with each other. They are orthogonal. And what is done quite frequently is to get around the multicolinearity problem is to do a factor analysis and then do the regressions with the factor scores, or numbers computed from those factor relationships, used as independent variables.

This has a disadvantage that you can't directly, if you do it that way, you can't directly determine what the regression co-efficients are for the specific variables that you're interested in. You get the regression co-efficients

for the factors.

[1649] Q. You've discussed or you've mentioned multicolinearity several times during the testimony, and I don't really think we've gotten to this point, but what specific effects does that have on the regression co-efficients?

A. Well, if two or more co-efficients, if two or more variables of a dependent, excuse me, independent variables are correlated, then the effects that each of those two variables have on the dependent variable is masked to some degree. Each co-efficient does not give a net effect of that variable on the, on the dependent variable.

And therefore, it's not possible to really say exactly what the effect of that variable is on the dependent variable as a result of that interrelationship.

There's sort of a confounding effect that distorts the co-efficients.

Q. Doctor Burford, what is meant by the terminology of a standardized regression co-efficient?

A. A standardized regression co-efficient is a regression co-efficient with the effects of scale removed.

For example, if I were to do a regression analysis on a set of data and then I were to multiply the data by 10 and do another regression analysis, the co-efficient on the second set would be ten times as large as the coefficient on the first set.

[1650] A standardized regression, or carry it a little farther, if I have two variables in the regression analysis, one stated in hundreds and another stated in thousands, I would expect that the co-efficient on that second variable will be considerably smaller than the co-efficient on the first variable, simply because of the effect of scale on those co-efficients.

Standardizing the co-efficients removes the effects of scales and puts them all on an equal footing. That way you can then compare the co-efficients on an equal basis, and determine which one is the more effective, and which one is less effective.

Q. What would be the possible effects of using, of not using standardized co-efficients in a case such as the instant case?

A. Well, it could make variables that are binary as compared to variables that have, well, let's say values that go from zero to ten, appear to be more, have greater impact than they actually do because of that scale effect.

Could I, could I elaborate on something I started to say

while ago and I sort of got sidetracked on it?

Q. Certainly?

A. It was referring to the use of factor analysis to try to correct for the multicolinearity, and I indicated there are some problems with using factor analysis with this kind of data also.

Factor analysis has the unfortunate feature that it [1651] assumes that all of the variables are normally distributed. So you have a multivariate normal distribution.

And in this particular case, all the variables are categorical, and since they are all categorical, none of them are normally distributed, and consequently, factor analysis really doesn't apply anyway.

Q. What is your opinion on the usefulness of a step-

wise regression procedure in this type of analysis?

A. Stepwise regression can be very dangerous. I sometimes feel that the development of stepwise regression in computer packages was a great disservice to, to statistics and to science.

What a stepwise regression does is to screen the variables that are included in the analysis and include those variables which make the greatest net contribution to, let's say, to the R-square, includes those co-efficients that are most statistically significant.

It knows nothing about what the nature of those variables is. It, whether these variables are variables that make any kind of logical sense or not is not taken into account by the stepwise procedure. It simply mechanically goes through the analysis. There are basically two variants of it. One is a forward stepwise and another one is a backward stepwise. The forward stepwise will take them one at a time and evaluate which ones will make the

greater contribution to R-square if included in the regression, with those variables that are already [1652] included there.

And backward stepwise just does it in reverse. It does a complete regression on all of them and then drops those that will reduce the R-square the least, considering all the rest of them that are in there.

And if the variables are highly intercorrelated, then the effect of this quite frequently is to drop variables that should not be dropped from a subject matter or substantive point of view and keep variables in that really make no sense at all from a subjective or conceptual point of view. So, it can be very misleading and can give you models that perhaps have relatively high R-squares and have significant co-efficients, but they don't mean anything.

# UNITED STATES DISTRICT COURT N.D. GEORGIA ATLANTA DIVISION

Civ. A. No. C81-2434A
WARREN MCCLESKEY, PETITIONER

v.

WALTER D. ZANT, RESPONDENT

Feb. 1, 1984

#### ORDER OF THE COURT

FORRESTER, District Judge.

Petitioner Warren McCleskey was convicted of two counts of armed robbery and one count of malice murder in the Superior Court of Fulton County on October 12, 1978. The court sentenced McCleskey to death on the murder charge and to consecutive life sentences, to run after the death sentence, on the two armed robbery charges. On automatic appeal to the Supreme Court of Georgia the convictions and the sentences were affirmed. McCleskey v. State, 245 Ga. 108, 263 S.E.2d 146 (1980). The Supreme Court of the United States denied Mc-Cleskey's petition for a writ of certiorari. McCleskey v. Georgia, 449 U.S. 891, 101 S.Ct. 253, 66 L.Ed.2d 119 (1980). On December 19, 1980 petitioner filed an extraordinary motion for a new trial in the Superior Court of Fulton County. No hearing has even been held on this motion. Petitioner then filed a petition for writ of habeas corpus in the Superior Court of Butts County. After an

evidentiary hearing the Superior Court denied all relief sought. McCleskey v. Zant, No. 4909 (Sup.Ct. of Butts County, April 8, 1981). On June 17, 1981 the Supreme Court of Georgia denied petitioner's application for a certificate of probable cause to appeal the decision of the Superior Court of Butts County. The Supreme Court of the United States denied certiorari on November 30, 1981. McCleskey v. Zant, 454 U.S. 1093, 102 S.Ct. 659, 70 L.Ed.2d 631 (1981).

Petitioner then filed this petition for writ of habeas corpus on December 30, 1981. He asserts 18 separate grounds for granting the writ. Some of these grounds assert alleged violations of his constitutional rights during his trial and sentencing. Others attack the constitutionality of Georgia's death penalty. Because petitioner claimed to have sophisticated statistical evidence to demonstrate that racial discrimination is a factor in Georgia's capital sentencing process, this court held an extensive evidentiary hearing to examine the merits of these claims. The court's discussion of the statistical studies and their legal significance is in Part II of this opinion. Petiticner's remaining contentions are discussed in Parts III through XVI. The court has concluded that petitioner is entitled to relief on only one of his grounds, his claim that prosecution failed to reveal the existence of a promise of assistance made to a key witness. Petitioner's remaining contentions are without merit.

#### I. DETAILS OF THE OFFENSE.

On the morning of May 13, 1978 petitioner and Ben Wright, Bernard Dupree, and David Burney decided to rob a jewelry store in Marietta, Georgia. However, after Ben Wright went into the store to check it out, they decided not to rob it. The four then rode around Marietta looking for another suitable target. They eventually decided to rob the Dixie Furniture Store in Atlanta. Each of the four was armed. The evidence showed that Mc-

Cleskey carried a shiny nickel-plated revolver matching the description of a .38 caliber Rossi revolver stolen in an armed robbery of a grocery store a month previously. Ben Wright carried a sawed-off shotgun, and the other two carried pistols. McCleskey went into the store to see how many people were present. He walked around the store looking at furniture and talking with one of the sales clerks who quickly concluded that he was not really interested in buying anything. After counting the people in the store, petitioner returned to the car and the four men planned the robbery. Executing the plan, petitioner entered the front of the store while the other three entered the rear by the loading dock. Petitioner secured the front of the store by rounding up the people and forcing them to lie face down on the floor. The others rounded up the employees in the rear and began to tie them up with tape. The manager was forced at gunpoint to turn over the store receipts, his watch, and \$6.00 Before the robbery could be completed, Officer Frank Schlatt, answering a silent alarm, pulled his patrol car up in front of the building. He entered the front door and proceeded down the center aisle until he was almost in the middle of the store. Two shots then rang out, and Officer Schlatt collapsed, shot once in the face and once in the chest. The bullet that struck Officer Schlatt in the chest richocheted off a pocket lighter and lodged in a nearby sofa. That bullet was recovered and subsequently determined to have been fired from a .38 caliber Rossi revolver. The head wound was fatal. The robbers all fled. Several weeks later petitioner was arrested in Cobb County in connection with another armed robbery. He was turned over to the Atlanta police and gave them a statement confessing participation in the Dixie Furniture Store robbery but denying the shooting.

Although the murder weapon was never recovered, evidence was introduced at trial that petitioner had stolen a .38 caliber Rossi in an earlier armed robbery. The State also produced evidence at trial that tended to show

that the shots were fired from the front of the store and that petitioner was the only one of the four robbers in the front of the store. The State also introduced over petitioner's objections the statements petitioner had made to Atlanta police. Finally, the State produced testimony by one of the co-defendants and by an inmate at the Fulton County Jail that petitioner had admitted shooting Officer Schlatt and had even boasted of it. In his defense petitioner offered only an unsubstantiated alibi defense.

The jury convicted petitioner of malice murder and two counts of armed robbery. Under Georgia's bifurcated capital sentencing procedure, the jury then heard arguments as to the appropriate sentence. Petitioner offered no mitigating evidence. After deliberating the jury found two statutory aggravating circumstances—that the murder had been committed during the course of another capital felony, an armed robbery; and that the murder had been committed upon a peace officer engaged in the performance of his duties. The jury sentenced the petitioner to death on the murder charge and consecutive life sentences on the armed robbery charges.

## II. THE CONSTITUTIONALITY OF THE GEORGIA DEATH PENALTY.

#### A. An Analytical Framework of the Law.

Petitioner contends that the Georgia death penalty statute is being applied arbitrarily and capriciously in violation of the Eighth and Fourteenth Amendments to the United States Constitution. He concedes at this level that the Eighth Amendment issue has been resolved adversely to him in this circuit. As a result, the petitioner wishes this court to hold that the application of a state death statute that permits the imposition of capital punishment to be based on factors of race of the defendant or race of the victim violates the equal protection clause of the Fourteenth Amendment.

It is clear beyond preadventure that the application of a statute, neutral on its face, unevenly applied against minorities, is a violation of the equal protection clause of the Fourteenth Amendment. Yick Wo v. Hopkins, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886). The more difficult question presented is why under the facts of this case the petitioner would be denied equal protection of the law if he is sentenced to death because of the race of his victim. This quandry has led the Eighth Circuit to find that a petitioner has no standing to raise this claim as a basis for invalidating his sentence. Britton v. Rogers, 631 F.2d 572, 577 n. 3 (8th Cir. 1980), cert. denied, 451 U.S. 939, 101 S.Ct. 2021, 68 L.Ed.2d 327 (1981).

While this circuit in Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978), reh'g denied, 441 U.S. 937, 99 S.Ct. 2064, 60 L.Ed.2d 667, application for stay denied, 442 U.S. 1301, 99 S.Ct. 2091, 60 L.Ed.2d 649 (1979), seemed to give lip service to this same point of view by approving the proposition that a district court "must conclude that the focus of any inquiry into the application of the death penalty must necessarily be limited to the persons who receive it rather than their victims," id. at 614 n. 39, the court in Spinkellink also adopted the position that a petitioner such as McCleskey would have standing to sue in an equal protection context:

Spinkellink [petitioner] has standing to raise the equal protection issue, even though he is not a member of the class allegedly discriminated against, because such discrimination, if proven, impinges on his constitutional right under the Eighth and Fourteenth Amendments not to be subjected to cruel and unusual punishment. See Taylor v. Louisiana, supra, 419 U.S. [522] at 526 [95 S.Ct. 692 at 695, 42 L.E.2d 690].

Id. at 612 n. 36. This footnote in Spinkellink warrants close examination. In Taylor v. Louisiana, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975), the Su-

preme Court held that a male had standing to challenge a state statute providing that a woman should not be selected for jury service unless she had previously filed a written declaration of her desire to be subject to jury service. The Court in Taylor cited to Peters v. Kiff, 407 U.S. 493, 92 S.Ct. 2163, 33 L.Ed.2d 83 (1972), to conclude: "Taylor, in the case before us, was similarly entitled to tender and have adjudicated the claim that the exclusion of women from jury service deprived him of the kind of factfinder to which he was constitutionally entitled." Id. at 526, 95 S.Ct. at 696. In Peters the Supreme Court rejected the contention that because a petitioner is not black, he has not suffered any unconstitutional discrimination. The rejection of the argument, however, was based not on equal protection grounds, but upon due process grounds. See 407 U.S. at 496-97, 497 n. 5, 501, 504, 92 S.Ct. at 2165-66 n.5 2168, 2169; id. at 509, 92 S.Ct. at 2171 (Burger, C.J., dissenting).

Thus, for Spinkellink to articulate an equal protection standing predicate based upon Sixth Amendment and due process cases can be characterized, at best, as curious. Furthermore, not only does it appear that case law in this circuit subsequent to Spinkellink assumes that a contention similar to that advanced by petitioner here is cognizable under equal protection, see, e.g., Adams v. Wainwright, 709 F.2d 1443, 1449-50 (11th Cir.), reh'g en banc denied, 716 F.2d 914 (11th Cir.1983); Smith v. Balkcom, 671 F.2d 858 (5th Cir.1982) (Unit B); but it appears that this circuit is applying equal protection standards to Eighth Amendment challenges of the death penalty. See, e.g., Adams v. Wainnwright, supra. Accord, Harris v. Pulley, 692 F.2d 1189, 1197-98 (9th Cir. 1982), reversed and remanded on other grounds, -U.S. —, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984). Indeed, in Spinkellink itself, the court adopted an analytical nexus between a cruel and unusual punishment contention and a Fourteenth Amendment equal protection evidentiary showing:

[T]his is not to say that federal courts should never concern themselves on federal habeas corpus review with whether Section 921.141 [Florida's death penalty statute] is being applied in a racially discriminatory fashion. If a petitioner can show some specific act or acts evidencing intentional or purposeful racial discrimination against him, see Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 [97 S.Ct. 555, 50 L.Ed.2d 450] (1977), either because of his own race or the race of his victim, the federal district court should intervene and review substantively the sentencing decision.

Spinkellink, 578 F.2d at 614 n. 40.

Principles of stare decisis, of course, mandate the conclusion that petitioner has standing to bring forth his claim. Furthermore, under stare decisis, this court must strictly follow the strictures of Spinkellink and its progeny as to standards of an evidentiary showing required by this petitioner to advance successfully his claim.

Were this court writing on a clean slate, it would hold that McCleskey would have standing under the due process clause of the Fourteenth Amendment, but not under the equal protection clause or the Eighth Amendment, to challenge his conviction and sentenced if he could show that they were imposed on him on account of the race of his victim. From a study of equal protection jurisprudence; it becomes apparent that the norms that underlie equal protection involve two values: (i) the right to equal treatment is inherently good; and (ii) the right to treatment as an equal is inherently good. See L. Tribe, American Constitutional Law, § 16-1, at 992-93 (1978). In this case, however, the evidence shows that the petitioner is being treated as any member of the majority would, or that petitioner's immutable characteristics have no bearing on his being treated differently from any member of the majority. Thus, with reference to his argument that he is being discriminated against on the basis of the race of his victim, equal protection interests are

not being implicated.

Petitioner also fails to state a claim under the Eighth Amendment. It is clear from the decisions of the Supreme Court that the death penalty is not per se cruel and unusual in violation of the Eighth Amendment. Prior to Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), the cruel and unusual punishments clause was interpreted as applicable to contentions that a punishment involved unnecessary pain and suffering, that it was so unique as not to serve a humane purpose, or so excessive as not to serve a valid legislative purpose. See Furman, 408 U.S. at 330-33, 92 S.Ct. at 2772-74 (Marshall, J., concurring). In other words, Eighth Amendment jurisprudence prior to Furman entailed an inquiry into the nexus between the offense and punishment; that punishment which was found to be excessive was deemed to violate Eighth Amendment concerns. The Supreme Court has determined as a matter of law that where certain aggravating features are present the infliction of the death penalty is not violative of the Eighth Amendment. Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed. 2d 859 (1976). In the instant case, petitioner's race of the victim argument does not address traditional Eighth Amendment concerns. His argument does not entail-nor could he seriously advance—any contention that his penalty is disproportionate to his offense, that his penalty constitutes cruel and unusual punishment, or that his penalty fails to serve any valid legislative interest.

What petitioner does contend is that the Georgia system allows for an impermissible value judgment by the actors within the system—that white life is more valuable than black life—and, as a practical matter, that the Georgia system allows for a double standard for sentencing. Certainly, such allegations raise life and liberty interests of the petitioner. Furthermore, such allegations speak not to the rationality of the process but to the val-

ues inherent in the process. In other words, it is the integrity, propriety, or "fairness" of the process that is being questioned by petitioner's contention, and not the mechanics or structure of the process. Thus, petitioner's allegation of an impermissible process speaks most fundamentally to Fourteenth Amendment due process interests, rather than Eighth Amendment interests that traditionally dealt with "cruel and unusual" contexts.

For all its consequences, "due process" has never been, and perhaps can never be, precisely defined. "[U]nlike some legal rules," this Court has said, due process "is not a technical conception with a fixed content unrelated to time, place and circumstances." Cafeteria Workers v. McElroy, 367 U.S. 886, 895 [81 S.Ct. 1743, 1748, 6 L.Ed.2d 1230]. Rather, the phrase expresses the requirement of "fundamental fairness," a requirement whose meaning can be as opaque as its importance is lofty. Applying the Due Process Clause is therefore an uncertain enterprise which must discover what "fundamental fairness" consists of in a particular situation by first considering any relevant precedents and then by assessing the several interests that are at stake.

Lassiter v. Department of Social Services, 452 U.S. 18, 24-25, 101 S.Ct. 2153, 2158-2159, 68 L.Ed.2d 640 (1981). It is clear that due process of law within the meaning of the Fourteenth Amendment mandates that the laws operate on all alike such that an individual is not subject to an arbitrary exercise of governmental power. See, e.g., Leeper v. Texas, 139 U.S. 462, 467-68, 11 S.Ct. 577, 579-80, 35 L.Ed. 225 (1891); Hurtado v. California, 110 U.S. 516, 535-36, 4 S.Ct. 111, 120-21, 28 L.Ed. 232 (1884). As Justice Frankfurter observed in Rochin v. California, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952) (footnote omitted):

Regard for the requirements of the Due Process Clause "inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings [resulting in a conviction] in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses." Malinski v. New York. supra, [324 U.S. 401] at 416-17 [65 S.Ct. 781 at 789, 89 L.Ed. 1029]. The standards of justice are not authoritatively formulated anywhere as though they were specifics. Due process of law is a summarized constitutional guarantee of respect for those personal immunities which, as Mr. Justice Cardozo twice wrote for the Court, are "so rooted in the traditions and conscience of our people as to be ranked as fundamental," Snyder v. Massachusetts, 291 U.S. 97, 105 [54 S.Ct. 330, 332, 78 L.Ed. 674], or are "implicit in the concept of ordered liberty." Palko v. Connecticut, 302 U.S. 319, 325 [58 S.Ct. 149, 152, 82 L.Ed. 2881.

See also Peters v. Kiff, 407 U.S. 493, 501, 92 S.Ct. 2163, 2168, 33 L.Ed. 83 (1972) ("A fair trial in a fair tribunal is a basic requirement of due process.") (citing In Re Murchison, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942 (1955)). See generally, L. Tribe, supra, § 10-7, at 501-06.

In summary, the court concludes that the petitioner's allegation with respect to race of the victim more properly states a claim under the due process clause of the Fourteenth Amendment. The allegation is that the death penalty was imposed for a reason beyond that consented to by the governed and because of a value judgment which, though rational, is morally impermissible in our society. As such, McCleskey could fairly claim that he was being denied his life without due process of law. Although he couches his claims in terms of "arbitrary and capricious," he is, to the contrary, contending not that the death penalty was imposed in his case arbitrarily or capriciously

but on account of an intentional application of an impermissible criterion. As the Supreme Court predicted in *Gregg* and as petitioner's evidence shows, the Georgia death penalty system is far from arbitrary or capricious.

This court is not, however, writing on a clean slate. Instead, it is obliged to follow the interpretations of its circuit on such claims. As noted earlier Yick Wo gives McCleskey standing to attack his sentence on the basis that it was imposed on him because of his race and Spinkellink gives him standing under the equal protection clause to attack his sentence because it was imposed because of the race of his victim. McCleskey is entitled to the grant of a writ of habeas corpus if he establishes that he was singled out for the imposition of the death penalty by some specific act or acts evidencing an intent to discriminate against him on account of his race or the race of his victim. Smith v. Balkcom, 660 F.2d 573 (5th Cir. Unit B 1981), modified in part, 671 F.2d 858 (1982); Spinkellink, supra. In Stephens v. Kemp, — U.S. —, 104 S.Ct. 562, 78 L.Ed.2d 370 (1983), Justice Powell, in a dissent joined in by the Chief Justice and Justices Rehnquist and O'Connor, made the following statement with reference to the Baldus study:

Although characterized by the judges of the court of appeals who dissented from the denial of the hearing en banc as a "particularized statistical study" claimed to show "intentional race discrimination," no one has suggested that the study focused on this case. A "particularized" showing would require—as I understand it—that there was intentional race discrimination in indicting, trying and convicting Stephens and presumably in the state appellate and state collateral review that several times follows the trial.

Id. 104 S.Ct. at 564 n. 2 (Powell, J. dissenting).

The intentional discrimination which the law requires cannot generally be shown by statistics alone.

Spencer v. Zant, 715 F.2d 1562, 1581 (11th Cir.1983), reh'g en banc granted, 715 F.2d 1583 (11th Cir.1983). Disparate impact alone is insufficient to establish a violation of the Fourteenth Amendment unless the evidence of disparate impact is so strong that the only permissible inference is one of intentional discrimination. Sullivan v. Wainwright, 721 F.2d 316 (11th Cir.1983); Adams v. Wainwright, 709 F.2d 1443 (11th Cir.1983); Smith v. Balkcom, 671 F.2d 858, 859 (5th Cir. Unit B), cert. denied, 459 U.S. 882, 103 S.Ct. 181, 74 L.Ed.2d 148 (1982).

B. An Analytical Framework of Petitioner's Statistical Evidence.

The petitioner does rely upon statistical evidence to support his contentions respecting the operation of racial discrimination on a statewide basis. He relies on statistical and anecdotal evidence to support his contentions that racial factors play a part in the application of the death penalty in Fulton County where he was sentenced.

Statistical evidence, of course, is nothing but a form of circumstantial evidence. Furthermore, it is said "that statistics are not irrefutable; they come in infinite variety and, like any other kind of evidence, they may be rebutted. In short, their usefulness depends on all of the surrounding facts and circumstances." *Teamsters v. United States*, 431 U.S. 324, 340, 97 S.Ct. 1843, 1857, 52 L.Ed.2d 396 (1977).

As courts have dealt with statistics in greater frequency, a body of common law has developed a set of statistical conventions which must be honored before statistics will be admitted into evidence at all or before they are given much weight. These common law statistical conventions prevail even over the conventions generally accepted in the growing community of economotricians. The first convention which has universally been honored in death penalty cases is that any statistical analysis

must reasonably account for racially neutral variables which could have produced the effect observed. See Smith v. Balkcom, supra; Spinkellink v. Wainwright, 578 F.2d 582, 612-16 (5th Cir.1978), cert. denied, 440 U.S. 976, 99 S.Ct. 1548, 59 L.Ed.2d 796 (1979); McCorquodale v. Balkcom, 705 F.2d 1553, 1556 (11th Cir.1983).

The second convention which applies in challenges brought under the equal protection clause is that the statistical evidence must show the likelihood of discriminatory treatment by the decision-makers who made the judgments in question. Adams v. Wainwright, supra; Maxwell v. Bishop, 398 F.2d 138 (8th Cir.1968) (Blackmun, J.), vacated on other grounds, 398 U.S. 262, 90 S.Ct. 1578, 26 L.Ed.2d 221 (1970).

The third general statistical convention is that the underlying data must be shown to be accurate. The fourth is that the results should be statistically significant. Generally, a statistical showing is considered significant if its "P" value is .05 or less, indicating that the probability that the result could have occurred by chance is 1 in 20 or less. Said another way, the observed outcome should exceed the standard error estimate by a factor of 2. Eastland v. TVA, 704 F.2d 613, 622 n. 12 (11th Cir.1983).

McCleskey relies primarily on a statistical technique known as multiple regression analysis to produce the statistical evidence offered in support of his contentions. This technique is relatively new to the law. This court has been able to locate only six appellate decisions where a party to the litigation relied upon multiple regression analysis. In two of them, the party relying on the analysis prevailed, but in both cases their showings were supported by substantial anecdotal evidence. E.g., Wade v. Mississippi Cooperative Extension Service, 528 F.2d 508 (5th Cir.1976). In four of them, the party relying upon the technique was found to have failed in his attempt to prove something through a reliance on it. Generally, the failure came when the party relying upon

multiple regression analysis failed to honor conventions which the courts insisted upon. Before a court will find that something is established based on multiple regression analysis, it must first be shown that the model includes all of the major variables likely to have an effect on the dependent variable. Second, it must be shown that the unaccounted-for effects are randomly distributed throughout the universe and are not correlated with the independent variables included. Eastland, supra, at 704.

In multiple regression analysis one builds a theoretical statistical model of reality and then attempts to control for all possible independent variables while measuring the effect of the variable of interest upon the dependent variable. Thus, a properly done study begins with a decent theoretical idea of what variables are likely to be important. Said another way, the model must be built by someone who has some idea of how the decisionmaking process under challenge functions. Three kinds of evidence may be introduced to validate a regression model: (1) Direct testimony as to what factors are considered, (2) what kinds of factors generally operate in a decision-making process like that under challenge, and (3) expert testimony concerning what factors can be expected to influence the process under challenge. Eastland, supra, at 623 (quoting Baldus and Cole, Statistical Proof of Discrimination).

Other cases have established other conventions for the use of multiple regression analysis. It will be rejected as a tool if it does not show the effect on people similarly situated; across-the-board disparities prove nothing. EEOC v. Federal Reserve Bank of Richmond, 698 F.2d 633, 656-58 (4th Cir. 1983), appeal pending; Valentino v. U.S. Postal Service, 674 F.2d 56, 70 (D.C. Cir.1982). A regression model that ignores information central to understanding the causal relationships at issue is insufficient to raise an inference of discrimination. Valentino, supra, at 71. Finally, the validity of the model depends upon a showing that it predicts the varia-

tions in the dependent variable to some substantial degree. A model which explains only 52 or 53% of the variation is not very reliable. Wilkins v. University of Houston, 654 F.2d 388, 405 (5th Cir.1981), cert. denied, 459 U.S. 822, 103 S.Ct. 51, 74 L.Ed.2d 57 (1982).

"To sum up, statistical evidence is circumstantial in character and its acceptability depends upon the magnitude of the disparity it reflects, the relevance of its supporting data, and other circumstances in the case supportive of or in rebuttal of a hypothesis of discrimination." EEOC v. Federal Reserve Bank of Richmond, supra, at 646-47. Where a gross statistical disparity can be shown, that alone may constitute a prima facie case of discrimination. This has become the analytical framework in cases brought under Title VII of the Civil Rights Act of 1964. Because Fourteenth Amendment cases have a similar framework and because there are relatively few such cases relying on statistics, when appropriate the court may draw upon Title VII cases. Jean v. Nelson, 711 F.2d 1455, 1486 n. 30 (11th Cir.), reh'g en banc granted, 714 F.2d 96 (1983).

Generally it is said that once the plaintiff has put on a prima facie statistical case, the burden shifts to the defendant to go forward with evidence showing either the existence of a legitimate non-discriminatory explanation for its actions or that the plaintiff's statistical proof is unacceptable. Johnson v. Uncle Ben's, Inc., 628 F.2d 419 (5th Cir.1980), cert. denied, 459 U.S. 967, 103 S.Ct. 293, 74 L.Ed.2d 277 (1982). The statistics relied upon by the plaintiff to establish a prima facie case can form the basis of the defendant's rebuttal case when, for example, the defendant shows that the numerical analysis is not the product of good statistical methodology. EEOC v. Datapoint Corp., 570 F.2d 1264 (5th Cir.1978). Said another way, a prima facie case is not established until the plaintiff has demonstrated both that the data base is sufficiently accurate and that the regression model has been properly constructed. Otherwise, the evidence would

be insufficient to survive a motion for directed verdict, and this is the sine qua non of a prima facie case. Jean. supra, at 1487. Statistics produced on a weak theoretical foundation are insufficient to establish a prima facie case.

Eastland, supra, at 625.

Once a prima facie case is established the burden of production is shifted to the respondent. If it has not already become apparent from the plaintiff's presentation, it then becomes the defendant's burden to demonstrate that the plaintiff's statistics are misleading, and such rebuttal may not be made by speculative theories. See Eastland, supra, at 618; Coble v. Hot Springs School District, 682 F.2d 721, 730-31 (8th Cir.1982); Jean v. Nelson, supra.

#### C. Findings of Fact.

The court held an evidentiary hearing for the purpose of enabling the petitioner to put on the evidence he had in support of his contention that racial factors are a consideration in the imposition of the death penalty. Hereafter are the court's findings as to what was established within the context of the legal framework set out above.

#### 1. The Witnesses

The principal witness called by the petitioner was Professor David C. Baldus. Professor Baldus is a 48-year-old Professor of Law at the University of Iowa. Presently he is on leave from that post and is serving on the faculty of the University of Syracuse. Baldus's principal expertise is in the use of statistical evidence in law. He and a statistician, James Cole, authored a book entitled Statistical Proof of Discrimination that was published by

<sup>&</sup>lt;sup>1</sup> A separate one-day hearing was had several months after the original hearing. The transcript of those proceedings appears in Volume X of the transcript, and that testimony will hereafter be referred to with the prefix "X."

McGraw-Hill in 1980. R 54-56. He has done several pieces of social science research involving legal issues and statistical proof. R 45-46, 53.

Before he became involved in projects akin to that under analysis here, Baldus apparently had had little contact with the criminal justice system. In law school he took one course which focused heavily on the rationale of the law of homicide. R 39. During his short stint in private practice he handled some habeas corpus matters and had discussions with a friend who was an Assistant District Attorney concerning the kinds of factors which his friend utilized in deciding how to dispose of cases. R 43-44. As a part of the preparation of statistical proof of discrimination, Baldus and his co-author, Cole, re-evaluated the data set relied upon in Maxwell v. Bishop, 398 F.2d 138 (8th Cir.1968), vacated on other grounds, 398 U.S. 262, 90 S.Ct. 1578, 26 L.Ed.2d 221 (1970), a rape case. R 72.

Baldus became interested in methods of proportionality review and, together with four other scholars, published findings in the Stanford Law Review and the Journal of Criminal Law and Criminology. R 89. This was done on the basis of an analysis of some capital punishment data from California. R 81, et seq. Thereafter Baldus became a consultant to the National Center for State Courts and to the Supreme Court of South Dakota and the Supreme Court of Delaware. It is understood that his consulting work involved proportionality review. R 95. Baldus and Cole have also prepared an article for the Yale Law Journal evaluating statistical studies of the death penalty to determine if it had a deterrent effect. R 78. At the University of Iowa Baldus taught courses on scientific evidence, discrimination law, and capital punishment.

Baldus was qualified by the court as an expert on the legal and social interpretation of data, not on the issue of whether or not the statistical procedures were valid under the circumstances. While Baldus has some familiarity with statistical methodology, he was quick to defer to

statistical experts where sophisticated questions of methodology were posed. See generally R 109-20.

Dr. George Woodworth was called by the petitioner and qualified as an expert in the theory and application of statistics and statistical computation, especially with reference to analysis of discreet outcome data. Dr. Woodworth is an Associate Professor of Statistics at the University of Iowa and collaborated with Baldus on the preparation of the study before the court. R 1193.

The petitioner also called Dr. Richard A. Berk, a Professor of Sociology at the University of California at Santa Barbara, and he was qualified as an expert in social science research with particular emphasis on the criminal

justice system. R 1749-53.

The respondents called two experts. One was Dr. Joseph Katz, an Assistant Professor at Georgia State University in the Department of Quantitative Methods. He was qualified as an expert in analyzing data, in research design, in statistics, statistical analysis and quantitative methods. R 1346. Dr. Katz is a rather recent graduate of Louisiana State University. The respondent also called Roger L. Burford, a Professor of Quantitative Business Analysis at LSU. He was Katz's mentor at the graduate level. Burford was qualified as a statistical expert. R 1627-32.

The court was impressed with the learning of all of the experts. Each preferred the findings and assumptions which supported his thesis, but it seemed to the court that no one of them was willing to disregard academic honesty to the extent of advancing a proposition for which there was absolutely no support.

#### 2. Scope of the Studies

Baldus and Woodworth conducted two studies on the criminal justice system in Georgia as it deals with homicide and murder cases. The first is referred to as the Procedural Reform Study. The second is referred to as the Charging and Sentencing Study. R 121-122.

The universe for the Procedural Reform Study included all persons convicted of murder at a guilt trial. Also included were several offenders who pled guilty to murder and received the death penalty. The time period for the study included offenders who were convicted under the new Georgia death penalty statute which went into effect on March 28, 1973, and included all such offenders who had been arrested as of June 30, 1978. In the Procedural Reform Study no sample of the cases was taken and instead the entire universe was studied. R 170-71. The data sources used by the researchers in the Procedural Reform Study were the files of the Georgia Supreme Court, certain information from the Department of Offender Rehabilitation, and information from the Georgia Department of Vital Statistics. R 175, et seq. Except for the few pleas, the Procedural Reform Study focused only on offenders who had been convicted of murder at a trial. R 122. There was approximately 550 cases in the universe for the Procedural Reform Study.

The Procedural Reform Study began when Baldus developed a questionnaire and dispatched two students to Georgia in the fall of 1979. In 1980 the coders returned to Georgia and coded 264 cases on site. R 241-43, DB 28, DB 28A. As two different questionnaires were used, the researchers wrote a computer program which translated the data gathered from both questionnaires into one format. R 246.

Baldus made some preliminary studies on the data that he gathered in the Procedural Reform Study. He found in these preliminary analyses no "race of the defendant" effect and a very unclear "race of the victim" effect. R 258. The Legal Defense Fund learned of Baldus's research and retained him to conduct the second study. R 256. Baldus was of the opinion that it was critical to the validity of the study that the strength of the evidence be measured. R 262. Also, he felt it important to examine the combined effects of all the decisions made at the different levels of the criminal justice system. R 147. Ac-

cordingly, the design of the Charging and Sentencing Study was different in that it produced measurements in these two respects in addition to measuring factors akin to those which were already being being taken into account in the Procedural Reform Study.

The universe for the Charging and Sentencing Study was all offenders who were convicted of murder or voluntary manslaughter whose crimes occurred after March 28, 1973 and whose arrests occurred before December 21, 1978. This produced a universe of about 2500 defendants. R 123, 263-64. Any defendant who was acquitted or convicted of a lesser-included offense is not included in the study. R 264.

From the universe of the Charging and Sentencing Study a random stratified sample was drawn. The first stratification was by outcome. The researchers drew a 25% random sample of murder cases with life sentences and a 25% random sample of voluntary manslaughter cases. R 1216. To this sample, all death penalty cases were added. R 267-69. The second stratification was geographic. The researchers drew a sample of 18 cases from each judicial circuit in Georgia. Where the circuit did not produce 18 cases in the first draw, additional cases were drawn from the population to supplement the original random sample. The results from each judicial circuit were then weighted so that each circuit contributed to the total effect in proportion to the total number of cases it contributed to the universe. R 270.

Because of the many factors involved in such an analysis, a simple binomial comparison would show nothing. To determine whether or not race was being considered, it is necessary to compare very similar cases. This suggests the use of a statistical technique known as cross tabulation. Because of the data available, it was impossible to get any statistically significant results in comparing exact cases using a cross tabulation method. R 705. Accordingly, the study principally relies upon multivariate analysis.

### 3. The Accuracy of the Data Base

As will be noted hereafter, no statistical analysis, much less a multivariate analysis, is any better than the accuracy of the data base. That accuracy was the subject of much testimony during the hearing. To understand the issue it is necessary to examine the nature of the questionnaires utilized and the procedures employed to enter the data upon the questionnaires.

The original questionnaire for the Procedural Reform Study was approximately 120 pages long and had foils (blanks) for the entry of data on about 500 variables. DB 27. The first 14 pages of the questionnaire were filled out by the Georgia Department of Offender Rehabilitation for Professor Baldus. The remainder of the pages were coded by students in Iowa based on extracts prepared by data gatherers in Georgia.

The data on the first 15 pages of the Procedural Reform Study questionnaire includes information on sentencing, basic demographic data concerning the defendant. his physical and psychiatric condition, his IQ, his prior record, as well as information concerning his behavior as an inmate. The next six pages of the questionnaire contained inquiries concerning the method of killing. Data is also gathered on the number of victims killed, information about co-perpetrators, and the disposition of their cases, and pleadings by the defendant. Another eight pages of questions search out characteristics of the offense. Three pages are reserved for data on contemporaneous offenses, and another three pages for the victim's role in the crime and the defendant's behavior after the homicide. There are additional pages on the role of co-perpetrators. There are more questions relating to the defense at trial and on the kinds of evidence submitted by the defendant. Then, there are 26 pages of questions concerning the deliberations of the jury and information concerning the penalty trial. The questionnaire concludes on matters relating to the disposition of the case with respect to other counts charged and, finally, the last page is reserved for the coder to provide a narrative summary of what occurred in the case. R 197-200, DB 27. This questionnaire also contained foils so that the coder could indicate whether or not the prosecutor or the jury was aware of the information being coded.

It is important to reiterate that this questionnaire was not coded by students having access to the raw data in Georgia. Instead, as noted above, two law students prepared detailed abstracts of each case. Their notes were dictated and transcribed. These notes, together with an abstract filled out by an administrative aide to the Georgia Supreme Court and the opinion of the Georgia Supreme Court, were assembled as a file and were available in Iowa to the coders. R 209, 212, 241.

During the 1979-80 academic year, another questionnaire, simpler in form, was designed for use in obtaining data for the Procedural Reform Study. This questionnaire dropped the inquiries concerning whether the sentencing jury was aware of the aggravating and mitigating factors appearing in the files. R. 230-31. Some of the questionnaires were coded in Georgia and some were coded in Iowa. Baldus developed a coding protocol in an effort to guide those who were entering data on the questionnaires. R 220-21, 227. The professional staff at the University of Iowa Computer Center entered the data obtained from the various Procedural Reform Study questionnaires into the computer.

Yet another questionnaire was designed for the Charging and Sentencing Study. The last questionnaire was modified in three respects. First, Baldus included additional queries concerning legitimate aggravating and mitigating factors because he had determined on the basis of his experience with earlier data that it was necessary to do so. Second, the questionnaire expanded the coverage of materials relating to prior record. Third, it contained a significant section on "strength of the evidence." R 274-77. After the new draft was produced and re-

viewed by several other academicians, it was reviewed by attorneys with the Legal Defense Fund. They suggested the addition of at least one other variable. R 275.

The Charging and Sentencing Study questionnaire is 42 pages long and has 595 foils for the recordation of factors which might, in Baldus's opinion, affect the outcome of the case. Generally, the kind of information sought included the location of the offense, the details of all of the charges brought against the offender, the outcome of the case, whether or not there was a plea bargain, characteristics of the defendant, prior record of the defendant, information regarding contemporaneous offenses, details concerning every victim in the case, characteristics of the offense, statutory aggravating factors, a delineation of the defendant's role vis-a-vis co-perpetrators', information on outcome of co-perpetrators' cases, other aggravating circumstances such as the number of shots fired, miscellaneous mitigating circumstances relating to the defendant or the victim, the defendant's defenses at the guilt trial, and the strength of the evidence. R 280-86. Again, all of these were categories of information which Baldus believed could affect the outcome of a given case.

A student who headed a portion of the data-gathering effort for the first study was placed in charge of five law students who were hired and trained to code the new questionnaires. R 308. This supervisor's name was Ed Gates.

The principal data source for the Charging and Sentencing study was records of the Georgia Department of Pardons and Paroles. This was supplemented with information from the Bureau of Vital Statistics and questionnaires returned from lawyers and prosecutors. Also, some information was taken from the Department of Offender Rehabilitation. R 293-94, DB 39. The records from the Department of Pardons and Paroles included a summary of the police investigative report prepared by a parole officer, an FBI rap sheet, a personal history evaluation, an admissions data summary sheet, and, on occa-

sion, the file might contain a witness statement or the actual police report. R 347. The police report actually appeared in about 25% of the cases. R 348. The Pardons and Paroles Board investigative summaries were always done after conviction.

Baldus and Gates again developed a written protocol in an attempt to assist coders in resolving ambiguities. This protocol was developed in part on past experience and in part on a case-by-case basis. R 239, 311, In the Charging and Sentencing Study the coders were given two general rules to resolve ambiguities of fact. The first rule was that the ambiguity ought to be resolved in a direction that supports the determination of the factfinder. The second rule is that when the record concerning a fact is ambiguous the interpretation should support the legitimacy of the sentence. R 423, EG 4.

As to each foil the coder had four choices. The response could be coded as 1, showing that the factor was definitely present, or 2, which means that the file indicated the presence of the factor. If the factor was definitely not present, the foil was left blank. In cases where it was considered equally possible for the factor to be absent or present, the coder entered the letter "U." R 517. For the purpose of making these coding decisions, it was assumed that if the file indicated that a witness who would likely have seen the information was present or if, in the case of physical evidence, it was of the type that the police would likely have been able to view, and if such information did not appear in the Parole Board summaries, then the coder treated that factor as not being present. R 521.

In addition to coding questionnaires the coders were asked to prepare brief summaries that were intended to highlight parts of the crime that were difficult to code. R 366.

By the end of the summer of 1981 the questionnaires had been coded in Georgia and they were returned to Iowa. R 585. All of the data collected had to be entered onto a magnetic tape, and this process was completed by

the Laboratory for Political Research at the University of Iowa. R 595. That laboratory "cleaned" the data as it was key punched; that is, where an impermissible code showed up in a questionnaire it was reviewed by a student coder who re-coded the questionnaire based upon a reading of Baldus's file. R 600-08.

After the data gathered for the Charging and Sentencing Study was entered on computer tapes, it was re-coded so that the data would be in a useful format for the planned analysis. The first step of the re-coding of the data was to change all 1 and 2 codes to 1, indicating that the factor was positively present. The procedure then re-coded all other responses as 0, meaning that the characteristic was not present. R 617-20.

It appears to the court that the researchers attempted to be careful in that data-gathering, but, as will be pointed out hereafter, the final data base was far from perfect. An important limitation placed on the data base was the fact that the questionnaire could not capture every nuance of every case. R 239.

Because of design of earlier questionnaires, the coders were limited to only three special precipitating events. There were other questions where there were limitations upon responses, and so the full degree of the aggravating or mitigating nature of the circumstances were not captured. In these situations where there was only a limited number of foils, the responses were coded in the order in which the student discovered them, and, as a consequence, those entered were not necessarily the most important items found with respect to the variable. R 545. The presence or absence of enumerated factors were noted without making any judgment as to whether the factor was indeed mitigating or aggravating in the context of the case. R 384.

In the Charging and Sentencing Study as well, there were instances where there was a limit on the number of applicable responses which could be entered. For example, on the variable "Method of Killing," only three foils

were provided. R 461, EG 6A, p. 14. The effect of this would be to reduce the aggravation of a case that had multiple methods of inflicting death. In coding this variable the students generally would list the method that actually caused the death and would not list any other contributing assaultive behavior. R 463.

The information available to the coders from the Parole Board files was very summary in many respects. For example, on one of the completed questionnaires the coder had information that the defendant had told four other people about the murder. The coder could not, however, determine from the information in the file whether the defendant was bragging about the murder or expressing remorse. R 467-68. As the witnesses to his statements were available to the prosecution and, presumably, to the jury, that information was knowable and probably known. It was not, however, captured in the study. The Parole Board summaries themselves were brief and the police reports from which the parole officers prepared their reports were typically only two or three pages long. R 1343.

Because of the incompleteness of the Parole Board studies, the Charging and Sentencing Study contains no information about what a prosecutor felt about the credibility of any witnesses. R 1117. It was occasionally difficult to determine whether or not a co-perpetrator testified in the case. One of the important strength of the evidence variables coded was whether or not the police report indicated clear guilt. As the police reports were missing in 75% of the cases, the coders treated the Parole Board summary as a police report. R 493-94. Then, the coders were able to obtain information based only upon their impressions of the information contained in the file. R 349.

Some of the questionnaires were clearly mis-coded. Because of the degree of latitude allowed the coders in drawing inferences based on the data of the file, a recoding of the same case by the same coder at a time subsequent might produce a different coding. R 370, 386-87. Also, there would be differences in judgment among the coders. R 387.

Several questionnaires, including the one for McCleskey and for one of his co-perpetrators, was reviewed at length during the hearing. There were inconsistencies in the way several variables were coded for McCleskey and his co-perpetrator. R 1113; Res. 1, Res. 2.

The same difficulties with accuracy and consistency of coding appeared in the Charging and Sentencing questionnaires. For example, the Charging and Sentencing Study had a question as to whether or not the defendant actively resisted or avoided arrest. McCleskey's questionnaire for the Charging and Sentencing Study indicated that he did not actively resist or avoid arrest. His questionnaire for the Procedural Reform Study indicated that he did. R 1129-30; Res. 2, Res. 4. Further, as noted above in one situation where it was undoubtedly knowable as to whether or not the defendant expressed remorse or bragged about the homicide, the factor was coded as "U." Under the protocol referred to earlier, if there was a witness present who could have known the answer and the answer did not appear in the file, then the foil is to be left blank. This indicates that the questionnaire, EG 6B, was not coded according to the protocol at foils 183 and 184.

To test the consistency of coding judgments made by the students, Katz tested the consistency of coding of the same factor in the same case as between the two studies as to 30 or so variables. There were 361 cases which appeared in both studies. Of the variables that Katz selected there were mis-matches in coding in all but two of the variables. Some of the mis-matches were significant and occurred within factors which are generally thought to be important in a determination of sentencing outcome. For example, there were mis-matches in 50% of the cases tested as to the number of death eligible factors occurring in the case. Other important factors and the percent of mis-matches are as follows:

Number of prior felonies	33%
Immediate Rage Motive	15%
Execution Style Murder	18%
Unnecessary Killing	18%
Defendant Additional Crimes	16%
Bloody	28%
Defendant Drug History	25%
Victim Aroused Fear in the Defendant	16%
Two or More Victims in All	80%
Victim is a Stranger	12%

## Respondent's Exhibit 20A, R 1440, et seq.

A problem alluded to above is the way the researchers chose to deal with those variables coded "U." It will be recalled that for a variable to be coded "U" in a given questionnaire, there must be sufficient circumstances in the file to suggest the possibility that it is present and to preclude the possibility that it is not present. In the Charging and Sentencing Study there are an average of 33 variables in each questionnaire which are coded as "U." The researchers treated that information as not known to the decision-maker. R 1155. Under the protocol employed, the decision to treat the "U" factors as not being present in a given case seems highly questionable. The threshold criteria for assuming that a factor was not present were extremely low. A matter would not have been coded "U" unless there was something in the file which made the coder believe that the factor could be present. Accordingly, if the researchers wished to preserve the data and not drop the cases containing this unknown information, then it would seem that the more rational decision would be to treat the "U" factors as being present.

This coding decision pervades the data base. Well more than 100 variables had some significant number of entries coded "U." Those variables coded "U" in more than ten percent of the questionnaires are as follows (the sample size in the Charging and Sentencing Study is 1.084):

Plea Bargaining	445
Employment Status of the Defendant	107
Victim's Age	189
Occupational Status of the Victim	721
Employment Status of the Victim	744
Defendant's Motion was Long-Term Hate	284
Defendant's Motive was Revenge	202
Defendant's Motive was Jealousy	130
Defendant's Motive was Immediate Rage	181
Defendant's Motive was Racial Animosity	447
Dispute While under the Influence of Alcohol	
or Drugs	159
Victim Mental Defective	625
Victim Pregnant	239
Victim Defenseless due to Disparity in Size	
or Numbers	134
Victim Support Children	781
Victim Offered No Provocation	192
Homicide Planned for More than Five Minutes	496
Execution-Style Homicide	109
Victim Pleaded for Life	799
Defendant Showed No Remorse for Homicide	902
Defendant Expressed Pleasure With Homicide	885
Defendant Created Risk of Death to Others	128
Defendant Used Alcohol or Drugs	
Before the Crime	251
Effect of Alcohol on the Defendant	220
Defendant Showed Remorse	913
Defendant Surrendered within 24 Hours	125
Victim Used Drugs or Alcohol Before Homicide	244
Effect of Drugs on Victim	168
Victim Aroused Defendant's Fear for Life	220
Victim Armed with Deadly Weapon	155
History of Bad Blood Between Defendant	
and Victim	173
Victim Accused Defendant of Misconduct	117
Victim Physically Assaulted Defendant	
at Homicide	159
Victim Verbally Threatened Defendant	
at Homicide	185

Victim Verbally Abused Defendant at	
Homicide	300
Victim Verbally Threatened Defendant Earlier	100
Victim Verbally Abused Defendant Earlier	156
Victim Had Bad Criminal Reputation	665
Victim had Criminal Record	946

A large number of other variables were coded "U" in more than five percent of the questionnaires. Race of the victim was unknown in 62 cases. Other variables which are often thought to explain sentencing outcomes and which were coded "U" in more than five percent of the questionnaires included:

Defendant's Motive was Sex	68
Defendant's Motive Silence Witness for	
Current Crime	72
Dispute with Victim/Defendant over	
Money/Property	76
Lovers' Triangle	74
Victim Defenseless due to Old Age	63
Defendant Actively Resisted Arrest	67
Number of Victims Killed by the Defendant	66
Defendant Cooperated with Authorities	72
Defendant had History of Drug and Alcohol Abuse	79
Victim Physically Injured Defendant at Homicide	63
Victim Physically Assaulted Defendant Earlier	71

Many of the variables showing high rates of "U" codings were used in Baldus's models. For example, in Exhibit DB 83, models controlling for 13, 14 and 44 variables, respectively, are used in an effort to measure racial disparities. In the 13-variable model, five of the variables have substantial numbers of "U" codes. In the 14-variable model, seven variables are likewise affected, and in the 44-variable model, six were affected. Similar problems plagued the Procedural Reform Study. Respondent's Exhibits 17A, 18A; DB 96A, DB 83, R 1429.

Because of the substantial number of "U" codes in the data base and the decision to treat that factor as not

present in the case, Woodworth re-coded the "U" data so that the coding would support the outcome of the case and ran a worst case analysis on five small models. This had the effect generally of depressing the coefficients of racial disparity by as much as 25%. In the three models which controlled for a relatively small number of background variables, he also re-computed the standard deviation based on his worst case analysis. In the two larger models on which he ran these studies, he did not compute the standard deviation, and in the largest model he did not even compute the racial coefficients after conducting the worst case analysis. Accordingly, it is impossible for the court to determine if the coefficient for race of the victim remains present or is statistically significant in these larger order regressions. Both because of this and because the models used in the validating procedure were not themselves validated, it cannot be said that the coding decision on the "U" data made no effect on the results obtained. See generally GW 4, Table 1.

In DB 122 and 123 Baldus conducts a worst case analysis which shows the results upon re-coding "U" data so as to legitimize the sentence. Baldus testified that the coding of unknowns would not affect the outcome of his analysis based on the experiments and these exhibits. The experiments do not, however, support his conclusions, and it would appear to the court that the experiments were not designed to support his conclusions. In DB 122 Baldus controls for only three variables; thence, it is impossible to measure the effect of any other variables or the effects that the re-coding would have on the outcome. In DB 123 he utilizes a 39-variable model and concludes that on the basis of the re-coding it has no effect on the racial coefficients. Only five of the variables in the 39variable model have any substantial coding problems associated with them. (For these purposes the court is defining a "substantial problem," as a variable with more than 100 entries coded "U.") These five variables are the presence of a statutory aggravating factor B3 and

B7D, hate, jealousy, and a composite of family, lover, liquor, or barroom quarrel. Baldus did not test any of his larger regressions to see what the effect would be. R 1701, et seq., DB 96A, Schedule 4, DB 122, DB 123, Res. Exh. 47A.

In addition to the questionable handling of the "U" codes, there were other factors which might affect the outcome of the study where information was simply unknown or unused. In the Charging and Sentencing Study data related with the response "Other" was not used in subsequent analyses. In one factor, "special aggravating feature of the offense," there were 139 "Other" responses. R 1392, 1437.

Cases where the race of the victim was unknown were coded on the principle of imputation, as though the race of the victim was the same as the race of the defendant. R 1096.

There were 23 or 24 cases in the Procedural Reform Study and 62 or 63 cases in the Charging and Sentencing Study where the researchers did not know whether or not a penalty trial had been held. R 1522. Baldus, on the basis of the rate at which penalty trials were occurring in his other cases, predicted what proportion of these that probably proceeded to a penalty trial. The criteria for deciding precisely which of these cases proceeded to a penalty trial and which did not is unknown to the court. R 1101. It is not beyond possibility that the treatment of these 62 cases could have skewed the results. The data becomes important in modeling the prosecutorial decisions to seek a death sentence after there had been a conviction. Based on his sample Baldus projects that something over 760 murder convictions occurred. If the 62 cases were proportionally weighted by a factor of 2.3 (2484 cases in the universe divided by 1084 cases in the sample equals 2.3), the effect would be the same as if he were missing data on 143 cases. Said another way, he would be missing data on about 18 to 20% of all of the decisions he was seeking to study. See generally R 1119.

The study was also missing any information on race of the victim where there were multiple victims. R 1146-47. Further, Baldus was without information on whether or not the prosecutor offered a plea bargain in 40% of the cases. R 1152. One of the strength of the evidence questions related to whether or not there was a credibility problem with a witness. Such information was available only in a handful of files. R 532-33. Further, the data would not include anything on anyone who was convicted of murder and received probation. R 186.

Multiple regression requires complete correct data to be utilized. If the data is not correct the results can be faulty and not reliable. R 1505-06. Katz urged that the most accepted convention in dealing with unknowns is to drop the observations from the analysis. R 1501-04. Berk opined that missing data seldom makes any difference unless it is missing at the order of magnitude of 30 to 45%. R 1766. This opinion by Berk rests in part upon his understanding that the missing data, whether coded "U" or truly missing, was unknowable to the decision-maker. In the vast majority of cases this is simply not the case.

After a consideration of the foregoing, the court is of the opinion that the data base has substantial flaws and that the petitioner has failed to establish by a preponderance of the evidence that it is essentially trustworthy. As demonsrated above, there are errors in coding the questionnaire for the case sub judice. This fact alone will invalidate several important premises of petitioner's experts. Further, there are large numbers of aggravating and mitigating circumstances data about which is unknown. Also, the researchers are without knowledge concerning the decision made by prosecutors to advance cases to a penalty trial in a significant number of instances. The court's purpose here is not to reiterate the deficiencies but to mention several of its concerns. It is a major premise of a statistical case that the data base numerically mirrors reality. If it does not in substantial degree

mirror reality, any inferences empirically arrived at are untrustworthy.

## 4. Accuracy of the Models

In a system where there are many factors which affect outcomes, an unadjusted binomial analysis cannot explain relationships. According to Baldus, no expert opinion of racial effects can rest upon unadjusted figures. R 731. In attempting to measure the effect of a variable of interest. Baldus testified that if a particularly important background variable is not controlled for, the coefficient for the variable of interest does not present a whole picture. Instead, one must control for the background effects of a variety of factors at once. One must, Baldus testified, identify the important factors in the system and control for them. R 694-95. Baldus also testified that a study which does not focus on individual stages in the process and does not control for very many background factors is limited in its power to support an inference of discrimination. R 146-47. Because he realized the necessity of controlling for all important background variables, he read extensively, consulted with peers, and from these efforts and from his prior analysis of data sets from California and Arkansas, he sought in his questionnaires to obtain information on every variable he believed would bear on the matter of death-worthiness of an individual defendant's case. His goal was to create a data set that would allow him to control for all of those background factors. R 194-95, 739. At this point it is important to emphasize a difference between the Procedural Reform Study and the Charging and Sentencing Study. The Procedural Reform Study contains no measures for strength of the evidence. Because Baldus was of the opinion that this could be a factor in whether or not capital punishment was imposed, information regarding the strength of the evidence was collected in the Charging and Sentencing Study. R 124, 286.

Baldus collected data on over 500 factors in each case. From the 500 variables he decided to select 230 for inclusion in further statistical analysis. R 659. He testified without further explanation that these 230 variables were the ones that he would expect to explain who received death sentences and who did not. R 661. X 631. Based on this testimony it follows that any model which does not include the 230 variables may very possibly not present a whole picture.

The 230 variable-model has several deficiencies. assumes that all of the information available to the datagatherers was available to each decision-maker in the system at the time that decisions were made. R 1122. This is a questionable assumption. To the extent that the records of the Parole Board accurately reflect the circumstances of each case, they present a retrospective view of the facts and circumstances. That is to say, they reflect a view of the case after all investigation is completed, after all pretrial preparation is made, after all evidentiary rulings have been handed down, after each witness has testified, and after the defendant's defense or mitigation is aired. Anyone who has ever tried a lawsuit would testify that it is seldom and rare when at progressive stages of the case he knows as much as he knows by hindsight. Further, the file does not reflect what was known to the jury but only what was known to the police. Legal literature is rife with illustrations of information known reliably to the parties which they never manage to get to the factfinders. Consequently, the court feels that any model produced from the data base available is substantially flawed because it does not measure decisions based on the knowledge available to the decision-maker.

Beyond that defect, there are other reasons to distrust the 230-variable model or any of the others proposed by Baldus. Statisticians have a method for measuring what portion of the variance in the dependent variable (here death sentencing rate) is accounted for by the independent variables included in the model. This measure is known as an adjusted r². The r² values for a model which is perfectly predictive of changes in the dependent variable would have a value of 1.0. The r² values for the models utilized by Woodworth to check the validity of his statistical techniques range from .15 to .39. The r² for the 230-variable model is between .46 and .48. The difference between the r² value and 1 may be explained by one of two hypotheses. The first is that the other unaccounted-for factors at work in the system are totally random or unique features of individual cases that cannot be accounted for in any systematic way. The other theory is that the model does not model the system. R 1266-69, GW 4, Table 1. As will appear hereafter, neither Baldus nor Woodworth believes that the system is random.

In summary, the r<sup>2</sup> measure is an indicia of how successful one has been with one's model in predicting the actual outcome of cases. R 1489. As the 230-variable model does not predict the outcome in half of the cases and none of the other models produced by the petitioner has an r<sup>2</sup> even approaching .5, the court is of the opinion that none of the models are sufficiently predictive to support inference of discrimination.

The regression equation, discussed in greater detail hereafter, postulates that the value of the dependent variable in a given case is the sum of the coefficients of all of the independent variables plus "U." In the equation the term "U" refers to all unique characteristics of an individual case that have not been controlled for on a system-wide basis. X 51-52. If the model is not appropriately inclusive of all of the systematic factors, then the "U" value will contain influences. X 90. The r² value is a summary statistic which describes collectively all of the "U" terms.

Sometimes it is said that "U" measures random effects. Woodworth testified that randomness does not necessarily reflect arbitrariness. He continued, "The world really isn't random. When we say something is random, we simply mean it's unaccountable, and that whatever does account for it is unique to each case . . . . This randomness that we use is a tag that phenomena which are unpredictable on the basis of variables we have observed [sic]." R 1272-73. By implication this means that even in the 230-variable model it is unique circumstances or uncontrolled-for variables which preponderate over the controlled-for variables in explaining death sentencing rates. This is but another way of saying that the models presented are insufficiently predictive to support an inference of discrimination.

None of the models presented have accounted for the alternative hypothesis that the race effects observed cannot be explained by unaccounted-for factors. This is further illustrated by an experiment that Katz conducted. He observed that when he controlled only for whether or not there had been a murder indictment and tried to predict the outcome based solely on the race of the victim, he obtained a regression coefficient of .07 which was statistically significant at the .0000000000000000000 level. He further observed that by the time Baldus had controlled for 230 variables, the "P" value or test of statistical significance was only approximately .02. He stated as his opinion that the positive value of the race of the victim coefficient would not disappear because it was a convenient variable for the equation to use in explaining actual outcome where so many cases in the sample were white victim cases. It was his opinion, however, that the race of the victim coefficient would become statistically insignificant with a model with a higher r2 which better accounted for all of the non-racial variables including interaction variables and composite variables which could be utilized. R 1563-70. This methodical decline in statistical significance of the race of the victim and race of the defendant effects as more variables are controlled for is demonstrated graphically in Table 1 which is attached to

the opinion as Appendix A.<sup>2</sup> There, it will be observed that if an additional 20 background variables are added beyond the 230-variable model and the data is adjusted to show the effect on death sentencing rates of appellate review, both the size of the coefficient for race of the victim and race of the defendant decreases by one-third, and the statistical significance decreases to .04 and .05, respectively.<sup>3</sup>

Based on the evidence the court is unable to find either way with respect to Katz's hypothesis. From the evidence offered in support and in contradiction of the hypothesis, the court does learn one thing: It was said that one indication of the completeness of a model is when one can find no additional variables to add which would affect the results obtained. The work by Katz and Woodworth shows instability in the findings of the small order models utilized in the study, and, therefore, it is further evidence that-they are not sufficiently designed so as to be reliable. See generally R 1729, Table 1, GW 6, Res. Exh. 24.

Based on all the foregoing, the court finds that none of the models utilized by the petitioner's experts are sufficiently predictive to support an inference of discrimination.

<sup>&</sup>lt;sup>2</sup> The teaching of this chart has a universal lesson for courts. That lesson is that where there is a multitude of factors influencing the decision-maker, a court cannot rely upon tests of statistical significance to validate the data unless it is first shown that the statistical model is sufficiently predictive.

<sup>&</sup>lt;sup>3</sup> Woodworth commented on this opinion of Katz's. He testified that it was his observation that after about ten variables were added to the model, the precipitous drop in levels of statistical significance leveled out, and therefore, he was of the opinion that it would require the addition of an enormous number of variables to make the coefficient insignificant. He had no opinion as to whether the addition of a number of variables would inevitably remove the effect. In fact, however, the trend line on GW 6 for statistical significance does not remain flat, even in Woodworth's studies. From the 10 to 20-variable models to the 230-variable models, the "P" value declines from something just under .00003 to something just over .005.

## 5. Multi-Colinearity.

As illustrated in Table 1, the petitioner introduced a number of exhibits which reflected a positive coefficient for the race of the victim and race of the defendant. The respondent has raised the question of whether or not those coefficients are in fact measuring racial disparities or whether the racial variables are serving as proxies for other permissible factors. Stated another way, the respondent contends that the Baldus research cannot support an inference of discrimination because of multicolinearity.

If the variables in an analysis are correlated with one another, this is called multi-colinearity. Where this exists the coefficients are difficult to interpret. R 1166. A regression coefficient should measure the impact of a particular independent variable, and it may do so if the other variables are totally uncorrelated and are independent of each other. If, however, there is any degree of interrelationship among the variables, the regression coefficients are somewhat distorted by that relationship and do not measure exactly the net impact of the independent variable of interest upon the dependent variable. Where multi-colinearity obtains, the results should be viewed with great caution.

In the Charging and Sentencing Study a very substantial proportion of the variables are correlated to the race of the victim and to the death sentencing result. R 1141-42. All or a big proportion of the major non-statutory aggravating factors and statutory aggravating factors show positive correlation with both the death sentencing result and the race of the victim. R 1142. More than 100 variables show statistically significant relationships with both death sentencing results and the race of the victim. R 1142. Because of this it is not possible to say with precision what, if any, effect the racial variables have on the dependent variable. R 1148, 1649. According to Baldus, tests of statistical significance will not always

detect errors in coefficients produced by multi-colinearity. R 1138, DB 92.

Katz conducted experiments which further demonstrated the truth of an observation which Baldus made: whitevictim cases tend to be more aggravated while black-victim cases tend to be more mitigated. Using the data base of the Procedural Reform Study, Katz conducted an analysis on 196 white-victim cases and 70 black-victim cases which had in common the presence of the statutory aggravating factor B2.4 Factor by factor, he determined whether white-victim cases or black-victim cases had the higher incidence of each aggravating and mitigating factor. The experiment showed that there were 25 aggravating circumstances which appeared at a statistically significant higher proportion in cases involving one racial group than they did in the other. Of these 25 aggravating circumstances, 23 of these occurred in white-victim cases and only 2 occurred in black-victim cases. Likewise with mitigating factors it was determined that 12 mitigating factors appeared in a higher proportion of black-victim cases whereas only one mitigating feature appeared in a higher proportion of white-victim cases. The results of this latter analysis were also statistically significant. R 1472, et seq., Res.Exh. 28. Similar or more dramatic results were obtained when the experiment was repeated with statutory factors B1, 3, 4, 7, 9 and 10. Res.Exh. 29-34: R 1477-80.

As he had done with the data from the Procedural Reform Study, Katz conducted an analysis to discover the relative presence or absence of aggravating or mitigating circumstances in white- and black-victim cases, using the Charging and Sentencing Study data. Only aggravating or mitigating circumstances, shown to be significant at the .05 level were utilized. Unknown responses were not considered. With but slight exception, each aggravat-

<sup>&</sup>lt;sup>4</sup> Katz utilized Baldus's characterization of factors as to whether they were aggravating or mitigating.

ing factor was present in a markedly higher percentage of white-victim cases than in black-victim cases, and conversely, the vast majority of the mitigating circumstances appeared in higher proportions in black-victim cases. Res. Exh. 49, 50, R 1534-35. Similar observations were made with reference to cases disposed of by conviction of volun-

tary manslaughter. Res.Exh. 51, 52, R 1536.

Yet another experiment was conducted by Katz. He compared the death sentencing rates for killers of white and black victims at steps progressing upwards from the presence of no statutory aggravating circumstances to the presence of six such circumstances. At the level where there were three of four statutory aggravating circumstances present, a statistically significant race of the victim effect appeared. He then compared the aggravating and mitigating circumstances within each group and in each instance found on a factor-by-factor basis that there was a higher number of aggravating circumstances which occurred in higher proportions in white-victim cases and a number of mitigating factors occurred in higher proportions in black-victim cases. The results were statistically significant. Res.Exh. 36, 37, R 1482.

All of the experts except Berk seemed to agree that there was substantial multi-colinearity in the data. Berk found rather little multi-colinearity. R 1756. Woodworth observed that multi-colinearity has the effect of increasing the standard deviation of the regression coefficients, and he observed that this would reduce the statistical significance. According to Woodworth the net effect of multicolinearity would be to dampen the effect of observed racial variables. R 1279-82. He also testified that he had assured himself of no effect from multi-colinearity because they were able to measure the disparities between white-victim and black-victim cases at similar levels of aggravation. For these two reasons Woodworth had the opinion that higher levels of aggravation in white-victim cases were not relevant to any issue. R 1297.

The court cannot agree with Woodworth's assessment. He and Baldus seem to be at odds about whether tests of

statistical significance will reveal and protect against results produced by multi-colinearity. His second point is also unconvincing. He contends that because he can measure a difference between the death sentencing rate in white-victim cases and black-victim cases at the same level of aggravation (and presumably mitigation), then the positive regression coefficients for this variable are not being produced by multi-colinearity. If Woodworth's major premise were correct, his conclusion might be tenable. The major premise is that he is comparing cases with similar levels of aggravation and mitigation. He is not. As will be discussed hereafter, he is merely comparing cases which have similar aggravation indices based on the variables included in the model. None of Woodworth's models on which he performed his diagnostics are large order regression analyses. Accordingly, they do not account for a majority either of aggravating or mitigating circumstances in the cases. Therefore, in the whitevictim cases there are unaccounted-for systematic aggravating features, and in the black-victim cases there are unaccounted-for systematic mitigating features. As will be seen hereafter, aggravating factors do increase the death penalty rate and mitigating factors do decrease the death penalty rate. Therefore, at least to the extent that there are unaccounted-for aggravating or mitigating circumstances, white-victim cases become a proxy for aggravated cases, and black-victim cases become a proxy, or composite variable, for mitigating factors.

The presence of multi-colinearity substantially diminishes the weight to be accorded to the circumstantial statistical evidence of racial disparity.

## 6. Petitioner's Best Case and Other Observations.

Based on what has been said to this point, the court would find that the petitioner has failed to make out a prima facie case of discrimination based either on race of the victim or race of the defendant disparity. There are many reasons, the three most important of which are

that the data base is substantially flawed, that even the largest models are not sufficiently predictive, and that the analyses do not compare like cases. The case should be at an end here, but for the sake of completeness, further findings are in order. In this section the statistical showings based on the petitioner's most complete model will be set out, together with other observations about the death penalty system as it operates in the State of

Georgia.

Woodworth testified, "No, the system is definitely not purely random. This system very definitely sorts people out into categories on rational grounds. And those different categories receive death at different rates." R 1277. An analysis of factors identified by Baldus as aggravating and mitigating, when adjusted to delete unknown values, gives a picture of a rational system when measured against case outcome. Virtually without exception, the presence of aggravating factors increases as the outcome moves from voluntary manslaughter to life sentence to death sentence. Conversely, factors identified by Baldus as being mitigating decrease in presence in cases as the outcome moves from voluntary manslaughter to life sentence to death sentence. R 1532. Res. Exh. 48.

These observations, other testimony by all of the experts, and the court's own analysis of the data put to rest in this court's mind any notion that the imposition of the death penalty in Georgia is a random event unguided by rational thought. The central question is whether any of the rationales for the imposing or not imposing of the death penalty are based on impermissible factors such as race of the defendant or race of the victim. In Baldus's opinion, based on his entire study, there are systematic and substantial disparities existing in the penalties imposed upon homicide defendants in the State of Georgia based on race of the homicide victim. Further, he was of the opinion that disparities in death sentencing rates do exist based on the race of the defendant, but they are not as substantial and not as systematic as is the case with the race of the victim effect. He was also of the opinion that both of these factors were at work in Fulton County. R 726-29. The court does not share Dr. Baldus's opinion to the extent that it expresses a belief that either of these racial considerations determines who receives the

death penalty and who does not.

Petitioner's experts repeatedly testified that they had added confidence in their opinions because of "triangulation." That is, they conducted a number of different statistical studies and they all produced the same results. R 1081-82. This basis for the opinion is insubstantial for two reasons. First, many tests showed an absence of a race of the defendant effect or an absence of a statistically significant race of the defendant effect or a statistically insignificant modest race of the defendant effect running against white defendants. As will be seen below, the race of the victim effect observed, while more persistent, did not always appear at a statistically significant level in every analysis. Second, Baldus's confidence is predicated upon a navigational concept, triangulation, which presumes that the several bearings being taken are accurate. The lore of the Caribbean basin is rich with tales of island communities supporting themselves from the booty of ships which have foundered after taking bearings on navigational aids which have been mischievously rearranged by the islanders. If one is going to navigate by triangulation, one needs to have confidence in the bearings that are being shot. As discussed earlier, Baldus is taking his bearings off of many models, none of which are adequately inclusive to predict outcomes with any regularity.

Baldus has testified that his 230-variable model contains those factors which might best explain how the death penalty is imposed. The court, therefore, views results produced by that model as the most reliable evidence presented by the petitioner. Additionally, in some tables Baldus employed a 250-variable model which adjusted for death sentencing rates after appellate review by Georgia courts. The race of the victim and race of

the defendant effects, together with the "P" values, are shown in the table below.

# TABLE 2 RACIAL EFFECTS TAKING INTO ACCOUNT ALL DECISIONS IN THE SYSTEM—LARGE SCALE REGRESSIONS

Weighted Least Squares Regression Results

### Coefficients and Level of Statistical Significance

	230 Variable Model	
Race of the Victim		Race of Defendant
.06		.06
(.02)		(.02)
	250 Variable Model	

### After Adjustment for Georgia Appellate Review

Race of the Victim	Race of Defendant	
.04	.04	
(.04)	(.05)	

In viewing Table 2, it is important to keep in mind that it purports to measure the net effect of the racial variables on all decisions made in the system from indictment forward. It shows nothing about the effect of the racial variables on the prosecutor's decision to advance a case to a penalty trial and nothing about the effect of the racial variables on the jury and its decision to impose the death penalty.

At this point it is instructive to know how Dr. Baldus interpreted his own findings on the racial variables. He says that the impact of the racial variable is small. R. 831. The chances that anybody is going to receive a death sentence is going to depend on what the other aggravating and mitigating circumstances are in the case. R. 828. At another point Baldus testified that:

[t]he race of the victim in this system is clearly not the determinant of what happened, but rather that is a factor like a number of other factors, that it plays a role and influences decision making.

The one thing that's, that struck me from working with these data for some time, there is no one factor

that determines what happens in the system. If there were, you could make highly accurate predictions of what's going to happen. This is a system that is highly discretionary, highly complex, many factors are at work in influencing choice, and no one factor dominates the system. It's the result of a combination of many different factors that produce the results that we see, each factor contributing more or less influence.

R 813. And at another point Dr. Baldus interpreted his data as follows:

The central message that comes through is the race effects are concentrated in categories of cases where there's an elevated risk of a death sentence. There's no suggestion in this research that there is a uniform, institutional bias that adversely affects defendants in white victim cases in all circumstances, or a black defendant in all cases. There's nothing to support that conclusion. It's a very complicated system.

R 842.

Because of these observations, the testimony of other witnesses, and the court's own analysis of the data, it agrees that any racial variable is not determinant of who is going to receive the death penalty, and, further, the court agrees that there is no support for a proposition that race has any effect in any single case.

An exhibit, DB 95, is produced in part in Table 3 below. It is perhaps the most significant table in the Baldus study. This table measures the race of the victim and the race of the defendant effect in the prosecutorial decision to seek the death sentence and in the jury sentencing decision to impose the death sentence. This is one of the few exhibits prepared by Baldus which utilizes data both from the Procedural Reform Study and the Charging and Sentencing Study. The first column shows

the racial effects after controlling for 230 variables in the Charging and Sentencing Study and 200 variables in the Procedural Reform Study.

#### TABLE 3

REGRESSION COEFFICIENTS (WITH THE LEVEL OF STATISTICAL SIGNIFICANCE IN PARENTHESES) FOR RACIAL VARIABLES IN ANALYSES OR PROSECUTORIAL DECISIONS TO SEEK AND JURY DECISIONS TO IMPOSE CAPITAL PUNISHMENT

> Controlling for All Factors in File (230 variables in Charging & Sentencing Study; 200 variables in Procedural Reform Study)

I.		Prosecutor Decision to Seek a Death Sentence		Regardless of Statistical Significant	If Statistically Significant at .10 Level
		A. Ra	ace of Victim		
		1.	Charging and Sentencing Study	.21 (.06)	.18 (.0001)
		2.	Procedural Reform Study	.12 (.01)	.13 (.0001)
		B. Race of Defendant			
		1.	Charging and Sentencing Study	.09 (.42)	.14 (.002)
		2.	Procedural Reform Study	.01 (.96)	.03
1	II.	I. Jury Sentencing Decisions 1			
		A. Ra	ace of Victim		
		1.	Charging and Sentencing Study	2	.05 (.37)
		2.	Procedural Reform Study		.06 (.42)
		B. Ra	ace of Defendant		
		1.	Charging and Sentencing Study		04 (.42)
		2.	Procedural Reform Study		02 .(75)

<sup>1</sup> Unweighted data used.

<sup>&</sup>lt;sup>2</sup> Simultaneous adjustment for all factors in the files was not possible because of the limited number of penalty trial decisions. (From DB 95).

The coefficients produced by the 230-variable model on the Charging and Sentencing Study data base produce no statistically significant race of the victim effect either in the prosecutor's decision to seek the death penalty or in the jury sentencing decision. A 200-variable model based on the Procedural Reform data base shows a statistically significant race of the victim effect at work on the prosecutor's decision-making, but that model is totally invalid for it contains no variable for strength of the evidence, a factor which has universally been accepted as one which plays a large part in influencing decisions by prosecutors. Neither model produces a statistically significant race of the defendant effect at the level where the prosecutor is trying to decide if the case should be advanced to a penalty trial. Neither model produces any evidence that race of the victim or race of the defendant has any statistically significant effect on the jury's decision to impose the death penalty. The significance of this table cannot be overlooked. The death penalty cannot be imposed unless the prosecutor asks for a penalty trial and the jury imposes it. The best models which Baldus was able to devise which account to any significant degree for the major non-racial variables. including strength of the evidence, produce no statistically significant evidence that race plays a part in either of those decisions in the State of Georgia.5

The same computations were repeated using only factors which were statistically significant at the .10 level. The court knows of no statistical convention which would permit a researcher arbitrarily to exclude factors on the

<sup>&</sup>lt;sup>5</sup> As an aside, the court should think that this table should put to rest the sort of stereotypical prejudice against Southern jurisdictions typified in the petitioner's brief by reliance on evidence in the Congressional Record in the 1870's concerning the existence of a disregard by Southern officials for the value of black life.

<sup>&</sup>lt;sup>6</sup> The regression coefficient of an independent variable would be the same regardless of whether it was a rare event or a frequent event. X 33.

basis of artificial criteria which experience and other research have indicated have some influence on the decisions at issue. The fact that a variable may not be statistically significant is more likely a reflection of the fact that it does not occur often, and not any sort of determination that when it does occur it lacks effect. Accordingly, the second model, set out in Table 3, does not meet the criterion of having been validated by someone knowledgeable about the inner workings of the decision-

making process.

The results in the second column are reproduced here because they demonstrate some other properties of the research. It is noted first that the race of the victim effect is lower in the Procedural Reform Study than in the Charging and Sentencing Study. As the Procedural Reform Study represents a universe of all cases and the Charging and Sentencing Study is a random sample, one possible explanation for the disparity in magnitude might be that the sampling techniques utilized in the Charging and Sentencing Study somehow overestimated the coefficients. Another interesting observation from this study is that even when the data is artificially manipulated, no statistically significant race of the victim or race of the defendant effect appears at the jury decision level. Last, this table demonstrates a property of the analyses throughout regarding race of the defendant. To the extent that race of the defendant appears as a factor, it sometimes appears as a bias against white defendants and sometimes appears as a bias against black defendants; very often, whatever bias appears is not statistically significant.

Finally, this table is an illustration of a point which the court made earlier. At the beginning, in assessing the credibility of the witnesses, the court noticed that all seemed to have something of a partisan bias. Thereafter, it noted that the results of certain diagnostics respecting the worst cases analysis in Woodworth's work were not reported in the exhibits given the court. Here, in this table, we are given no outcomes based on the larger scaled regressions for the racial variables at the jury sentencing level. It is said that the data was not provided because it was not possible to conduct simultaneous adjustment for all factors in the file because of the limited number of penalty trial decisions. From all that the ccurt has learned about the methods employed, it does not understand that the analysis was impossible, but instead understands that because of the small numbers the results produced may not have been statistically significant.

The figures on racial disparities in prosecutorial and jury decision-making do not reflect the effects of racial disparities that might have resulted in earlier phases of the system. R 933. A stepwise regression analysis of the statewide data in the Charging and Sentencing Study was done in an effort to measure the race of the victim and race of the defendant effects at different stages of the procedure from indictment through the imposition of the death penalty.7 This regression analysis suggested that there is an increased willingness by prosecutors to accept pleas to voluntary manslaughter if the race of the victim is black. R 1062-68, DB 117. This suggests a possibility that the racial effects observed in Table 2 may be the result of bias at a plea bargaining stage.8 This is not established by the evidence, and it is immaterial to this case, for Baldus did not believe that McCleskey's case would have had any likelihood of being disposed of on a voluntary manslaughter plea. R 1064-65. Baldus

<sup>&</sup>lt;sup>7</sup> Stepwise regression is a process carried out by a computer which selects the background variables sequentially based on which provides the best fit. It makes no judgment as to whether or not the variables it selects might in reality have anything to do with the decision. Any model produced by stepwise regression would not meet the legal statistical conventions discussed earlier in that the model is not validated by a person who is by experience or learning acquainted with how the process actually works.

<sup>8</sup> McCleskey was offered a life sentence in return for a guilty plea. (See State Habeas Transcript, Testimony of Turner).

noted that there were strong effects with respect to both race of the defendant and race of the victim at the plea bargaining level. R 1040. It is to be remembered that on this point his data base was far from complete. Finally, it is noted that this study did not attempt to discern if any of the racial disparities noted at the plea bargaining stages could be explained by any of the current theories on the factors governing plea bargaining. R 1159-63.

## 7. What a Multivariate Regression Can Prove

Before one can begin to utilize the results of the Baldus study, whether from the larger order regressions or from the small models, an understanding of the techniques employed is necessary. Such an understanding produced in the court's mind other qualifiers which at least in this case substantially diminish the weight of the evidence produced.

Regression analysis is a computational procedure that describes how the average outcome in a process, here the death sentencing rate, is related to particular characteristics of the cases in the system. A least squares regression coefficient displays the average difference in the death penalty rate across all cases caused by the independent variable of interest. In a regression procedure one may theoretically measure the impact of one variable of interest while "controlling" for other independent variables. Conceptually, the coefficient of the variable of interest is the numerical difference in death sentencing rates between all cases which have the variable of interest and all cases which do not. R 689, et seq., 1222-23. The chief assumption of a weighted least square regression is that the effect of the variable of interest is consistent across all cases. Woodworth testified that the assumption was not altogether warranted in this case.9 That the variable of interest, here race of the victim, is not the same against all cases is graphically seen in a preliminary cross tabulation

<sup>&</sup>lt;sup>9</sup> He testified, however, that the data was interpretable because he convinced himself that the violations of the assumption were not in themselves responsible for the findings of significant racial effects. R 1223-24, 1228.

done by Baldus. In this experiment, cases which were similar in that they had a few aggravating and mitigating factors in common were grouped into four subgroups. The race of the victim disparity ranged from a low of .01 through .04 to .15 and finally to .25. The weighted least squares regression coefficient for these same cases was .09. R 781, DB 76, DB 77.

Statistical significance is another term which the court and the parties used regularly. This term connotes a test for rival hypotheses. There is a possibility that an effect could be present purely by chance, or by the chance combination of bad luck in drawing a sample, or by chance combination of events in the charging and sentencing process that may produce an accidental disparity which is not systematic. Statistical significance computes the probability that such a disparity could have arisen by chance, and, therefore, it tests the rival hypothesis that chance accounts for the results that were obtained. R 1244-45. Tests of statistical significance are a measure of the amount by which the coefficient exceeds the known standard deviation in the variable, taking into account the size of the sample. Considering the values used in this study, a statistical significance at the .05 level translates into a two-standard deviation disparity, and a statistical significance at the .01 level approaches a three-standard deviation level. R 1246-47. R 712-17. As noted earlier a low "P" value, a measure of statistical significance, does not, at least in the case of multi-variate analysis, assure that the effect observed by any one model is in fact real.

The use of regression analysis is subject to abuse. Close correlations do not always say anything about causation. Further, a regression analysis is no better than the data that went into the analysis. It is possible to obtain a regression equation which shows a good statistical fit in the sense of both low "P" values and which r² values where one has a large number of variables, even when it is known in advance that the data are totally unrelated to each other. R 1636-37.

What the regression procedure does by algebraic adjustment is somewhat comparable to a cross tabulation analysis. It breaks down the cases into different sub-categories which are regarded as having characteristics in common. The variable of interest is calculated for each sub-category

and averaged across all sub-categories. R 791-92.

The model tries to explain the dependent variable by the independent variables that it is given. It does this by trying to make the predicted outcome the same as the actual outcome in terms of the factors that it is given. R 1487-88. For example, if a regression equation were given ten independent variables in a stagewise process, it would guess at the regression coefficient for the first variable by measuring the incremental change in the dependent variable caused by the addition of cases containing a subsequent independent variable. X 29. After the initial mathematical computation, the equation then goes back and re-computes the coefficients it arrived at earlier, using all of the subsequent regression coefficients that it has calculated. It continues to go through that process until coefficients which best predict actual outcome are arrived at for each variable, X 43-46.

By its nature, then, the regression equation can produce endless series of self-fulfilling prophecies because it always attempts to explain actual outcomes based on whatever variables it is given. If, for example, the data base included information that of the 128 defendants who received the death penalty, 122 of them were right-handed, the regression equation would show that the system discriminated against right-handed people. This is so because that factor occurs so often that it is the most "obvious" or "easy" explanation for the outcomes observed. In the case at bar, there are 108 white-victim cases where death was imposed and 20 black-victim cases where death was imposed. DB 63. Accordingly, the regression coefficients for the racial variables could have been artificially produced because of the high incidence of cases in which the victim was white.

Another feature of Baldus's analyses is that he is trying to explain dischotomous outcomes (life or death) with largely dichotomous independent variables (multiple stabbing present or not present) and a regression equation requires continuous dependent and independent variables. Accordingly, Baldus developed indices for the dependent variable (whether or not the death penalty was imposed). He utilized an average rate for a group of cases. For the independent variables he developed an artificial measure of similarity called an aggravation index to control simultaneously for aggravating and mitigating circumstances so that cases could be ranked on a continuous scale. R 1484. It is important to understand that the cases being compared in the regression analyses used here are not at all factually similar. Their principal identity is that their aggravation index, the total of all positive regression coefficients minus all negative regression coefficients, is similar. X 14-15. The whole study rests on the presumption that cases with similar aggravation indexes are similarly situated. R 1311. This presumption is not only rebuttable, it is rebutted, if by nothing else, then by common sense. As Justice Holmes observed in Towne v. Eisner, 245 U.S. 418, 38 S.Ct. 158, 62 L.Ed. 372 (1918):

A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used.

Id. at 425, 38 S.Ct. at 159, quoting Lamar v. United States, 240 U.S. 60, 65, 36 S.Ct. 255, 256, 60 L.Ed. 526 (1916). The same thought, it seems to the court, is apropos for the aggravation index. It allows a case with compelling aggravating circumstances, offset only by a series of insignificant mitigating circumstances, to be counted as equal to a case with the same level of aggravation and one substantial mitigating factor having the same numerical value as the series of trifling ones in the first case. The court understands that strength of the evi-

dence measures generally are positive coefficients. To the extent that this is true, a strong evidentiary case with weak aggravating circumstances would be considered the same as a brutal murder with very weak evidence. Other examples abound, but the point is that there is no logical basis for the assumption that cases with similar aggravation indices are at all alike. Further, the aggravation index for any given case is a function of the variables that are included in the model. Any change in the variables included in the model will also change the aggravation index of most, it not all, cases.

The variability of the aggravation index as factors are added or deleted is well demonstrated by Respondent's Exhibit 40. One case comparison will serve as an example. In a life sentence case, C 54, an aggravation index (or predicted outcome index, R 1485) was computed using a six-variable model. Calculation produced an index of .50. Katz conducted four additional regressions, each adding additional factors. By the time the more inclusive regression number five was performed, the aggravation index or predicted outcome was .08 (0 equals no death penalty, 1 equals death penalty). In a death case, C 66, the first regression analysis produced an index of .50. However, the aggravation coefficient or predicted outcome rose to .89 when the facts of the case were subjected to the fifth regression analysis. Thence, two cases which under one regression analysis appeared to be similar, when subjected to another analysis may have a totally different aggravation index. ResExh. 40, R 1483-1501.

In interpreting the Baldus data it is important to understand what he means when he says that he has controlled for other independent variables or held other individual variables constant. What these terms usually mean is that a researcher has compared cases where the controlled-for variables are present in each case and where the cases are divided into groups where the variable of interest is present and where the variable of interest is not present. That is not what occurs in regression

analysis. To be sure, the cases are divided into groups where the variable of interest is present and groups where it is not present. There is, however, absolutely no assurance that the background variables being controlled for are present in all of the cases, in any of the cases, or present in the same combination in any of the cases. Consequently, other factors are not being held constant as that term is usually used. See generally R 152, X 7, 19-25.

Courts are accustomed to looking at figures on racial disparity and understanding that the figure indicates the extent or degree of the disparity. It is often said that statistical evidence cannot demonstrate discrimination unless it shows gross disparities. Contrary to the usual case, the court has learned that at least in this case the size of a regression coefficient, even one statistically significant at the .05 level, says nothing about the specific degree of disparity or discrimination in the system. All the regression coefficient indicates is that the difference in average outcome where the racial variable is present from cases where it is not present is large enough to enable one to say that the true mean of both groups are not exactly equal. R 1635, 1670-71. Baldus made an effort to demonstrate the relative importance of the racial variables by showing them in an array of coefficients for other variables. The court later learned, however, that where some of the variables are binary or dichotomous and some are continuous (for example, number of mitigating features present), one cannot use the size of the regression coefficient as an indication of the relative strength of one variable to another, R 1783.

Consistent with the difficulty in quantifying the effect of any variable found to be at work in the system, Baldus testified that a regression analysis really has no way of knowing what particular factors carry the most weight with the decision-maker in any one case. R 1141. Based on his entire analysis Baldus was unable to quantify the effect that race of the victim may have had in McCleskey's case. R 1083-85. After a review of the Baldus study, Berk

was unable to say whether McCleskey was singled out to receive the death penalty because his victim was white, nor was he able to say that McCleskey would have escaped the death penalty if his victim had been black. Berk went on to testify:

Models that are developed talk about the effects on the average. They do not depict the experience of a single individual. What they say, for example, that on the average, the race of the victim, if it is white, increases on the average the probability . . . (that) the death sentence would be given.

Whether in a given case that is the answer, it cannot be determined from statistics. R 1785.

In summary, then, Baldus's findings from the larger scale regressions or from any of the others must be understood in light of what his methods are capable of showing. They do not compare identical cases, and the method is incapable of saying whether or not any factor had a role in the decision to impose the death penalty in any particular case. A principal assumption which must be present for a regression analysis to be entirely reliable is that the effects must be randomly distributed—that is not present in the data we have. The regression equation is incapable of making qualitative judgments and, therefore, it will assign importance to any feature which appears frequently in the data without respect to whether that factor actually influences the decision-maker. Regression analysis generally does not control for back-ground variables as that term is usually understood, nor does it compare identical cases. Because Baldus used an index method, comparable cases will change from model to model. The regression coefficients do not quantitatively measure the effect of the variables of interest.

With these difficulties, it would appear that multivariate analysis is ill suited to provide the court with circumstantial evidence of the presence of discrimination, and it

is incapable of providing the court with measures of qualitative difference in treatment which are necessary to a finding that a prima facie case has been established with statistical evidence. Finally, the method is incapable of producing evidence on whether or not racial factors played a part in the imposition of the death penalty in any particular case. To the extent that McCleskey contends that he was denied either due process or equal protection of the law, his methods fail to contribute anything of value to his cause.

## 8. A Rebuttal to the Hypothesis

A part of Baldus's hypothesis is that the system places a lower value on black life than on white life. If this is true, it would mean that the system would tolerate higher levels of aggravation in black victim cases before the sys-

tem imposes the death penalty.

The respondent postulates a test of this thesis. It is said that if Baldus's theory is correct, then one would necessarily find aggravation levels in black-victim cases where a life sentence was imposed to be higher than in white-victim cases. This seems to the court to be a plausible corollary to Baldus's proposition. To test this corollary, Katz, analyzing aggravating and mitigating factors one by one, demonstrated that in life sentence cases, to the extent that any aggravating circumstance is more prevalent in one group than the other, there are more aggravating features in the group of white-victim cases than in the group of black-victim cases. Conversely, there were more mitigating circumstances in which blackvictim cases had a higher proportion of that circumstance than in white-victim cases. R 1510-15, 1540, Res. Exh. 43, 53, 54.

Because Katz used one method to demonstrate relative levels of aggravation and Baldus used another, his index method, the court cannot say that this experiment alone conclusively demonstrates that Baldus's theory is wrong.

It is, however, direct rebuttal evidence of the theory; and as such, stands to contradict any prima facie case of system-wide discrimination based on race of the victim even if it can be said that the petitioner has indeed established a prima facie case. The court does not believe that he has.

# 9. Miscellaneous Observations on the Statewide Data.

So that a reader may have a better feeling of subsidiary findings in the studies and a better understanding of collateral issues in the case, some additional observa-

tions are presented on Baldus's study.

Some general characteristics of the sample contained in the Charging and Sentencing Study which the court finds of interest are as follows. The largest group of defendants was in the 18 to 25-year-old age group. Only ten percent had any history of mental illness. Only three percent were high status defendants. Only eight percent of the defendants were from out of state. Females comprised 13% of the defendants. Of all the defendants in the study 35% had no prior criminal record, while 65% had some previous conviction. Co-perpetrators were not involved in 79% of the cases, and 65% of the homicides were committed by lovers in a rage. High emotion in the form of hate, revenge, jealousy or rage was present in 66% of the cases. Only one percent of the defendants had racial hatred as a motive. Victims provoked the defendant in 48% of the cases. At trial 26% confessed and offered no defense. Self defense was claimed in 33% of the cases, while only two percent of the defendants relied upon insanity or delusional compulsion as a defense. Defendants had used alcohol or drugs immediately prior to the crime in 38% of the cases. In only 24% of the cases was a killing planned for more than five minutes. Intimate associates, friends, or family members accounted for 44% of the victims. Black defendants accounted for 67% of the total, and only 12% of the homicides were committed across racial lines. The largest proportion (58%) of the homicides were committed by black defendants against black victims. R 659, et seq., DB 60.10

From the data in the Charging and Sentencing Study it is learned that 94% of all homicide indictments were for murder. Of those indicted for murder or manslaughter 55% did not plead guilty to voluntary manslaughter. There were trials for murder in 45% of the cases and 31% of the universe was convicted of murder. In only ten percent of the cases in the sample was a penalty trial held, and in only five percent of the sample were defendants sentencd to death. DB 58, R 64-65. See also DB 59, R 655.

In his analysis of the charging and sentencing data, Baldus considered the effect of Georgia statutory aggravating factors on death sentencing rates, and several things of interest developed. The statutory aggravating circumstances are highly related or correlated to one another. That is to say that singularly the factors have less impact than they do in combination. Even when the impact of the statutory aggravating circumstances is adjusted for the impact of the presence of others, killing to avoid arrest increased the probability of a death sentence by 21 points, and committing a homicide during the course of a contemporaneous felony increased the probability of getting the death penalty by 12 points. R 709-11, DB 68. Where the B8 and B10 factors are present together, the death penalty rate is 39%. DB 64. Based on these preliminary studies one might conclude that a

<sup>10</sup> One thing of interest came out in DB 60 concerning the evaluation of the coders. In their judgment 92% of all the police reports that they studied indicated clear guilt. This is interesting in view of the fact that only 69% of all defendants tried for murder were convicted. This suggests either that the coders did not have enough experience to make this evaluation, or the more likely explanation is that the Parole Board summaries were obtained from official channels and only had the police version and had little if any gloss on the weaknesses of the case from the defendant's perspective.

defendant committing a crime like McCleskey's had a greatly enhanced probability of getting the death penalty.

Of the 128 death sentences in the Charging and Sentencing Study population, 105 of those were imposed where the homicide was committed during the course of an enumerated contemporary offense. Further, it is noted that the probability of obtaining the death penalty is one in five if the B2 factor is present, a little better than one in five if the victim is a policeman or fireman, and the probability of receiving the death penalty is about one in three if the homicide was committed to avoid arrest. These, it is said, are the three statutory aggravating factors which are most likely to produce the death penalty, and all three were present de facto in McCleskey's case. DB 61.

When the 500 most aggravated cases in the system were divided into eight categories according to the level of the aggravation index, the death penalty rate rose dramatically from 0 in the first two categories, to about 7% in the next two, to an average of about 22% in the next two, to a 41% rate at level seven, and an 88% rate at level eight. Level eight was composed of 58 cases. The death sentencing rate in the 40 most aggravated cases was 100%. DB 90, R 882. Baldus felt that data such as this supported a hypothesis arrived at earlier by other social science researchers. This theory is known as the liberation hypothesis. The postulation is that the exercise of discretion is limited in cases where there is little room for choice. If the imposition of the death penalty or the convicting of a defendant is unthinkable because the evidence is just not there, or the aggravation is low, or the mitigation is very high, no reasonable person would vote for conviction or the death penalty, and, therefore, impermissible factors such as race effects will not be noted at those points. But, according to the theory. when one looks at the cases in the mid-range where the facts do not clearly call for one choice or the other, the decision-maker has broader freedom to exercise discretion, and in that area you see the effect of arbitrary or impermissible factors at work. R 884, R 1135.11

Baldus did a similar rank order study for all cases in the second data base. He divided the cases into eight categories with the level of aggravation increasing as the category number increased. In this analysis he controlled for 14 factors, but the record does not show what those factors were. The experiment showed that in the first five categories the death sentencing rate was less than one percent, and there was no race of the victim or race of the defendant disparity observed. At level six and nine statistically significant race of the victim disparities appeared at the 9 point and 27 point order of magnitude. Race of the defendant disparities appeared at the last three levels, but none were statistically significant. A minor race of the victim disparity was noted at level 7 but the figure was not significant. The observed death sentencing rates at the highest three levels were two percent, three percent, and 39%. DB 89. Exhibit DB 90 arguably supports Baldus's theory that the liberation hypothesis may be at work in the death penalty system in that it does show higher death sentencing rates in the mid-range cases than in those cases with the lowest and highest aggravation indices. On the other hand, Exhibit DB 89, which, unlike DB 90, is predicated on a multiple regression analysis, shows higher racial disparities in the most aggravated level of cases and lower or no racial disparities in the mid-range of aggravation. Accordingly,

<sup>11</sup> Part of the moral force behind petitioner's contentions is that a civilized society should not tolerate a penalty system which does not avenge the murder of black people and white people alike. In this connection it is interesting to note that in the highest two categories of aggravation there were only ten cases where the murderer of a black victim did not receive the death penalty while in eleven cases the death penalty under similar circumstances was imposed. This is not by any means a sophisticated statistical analysis, but even in its simplicity it paints no picture of a systematic deprecation of the value of black life.

the court is unable to find any convincing evidence that the liberation hypothesis is applicable in this study.

Baldus created a 39-variable model which was used for various diagnostics. It was also used in an attempt to demonstrate that given the facts of McCleskey's case, the probability of his receiving the death penalty because of the operation of impermissible factors was greatly elevated. Although the model is by no means acceptable,12 it is necessary to understand what is and is not shown by the model, as it is a centerpiece for many conclusions by petitioner's experts. On the basis of the 39-variable model McCleskey had an aggravation score of .52. Woodworth estimated that at McCleskey's level of aggravation the incremental probability of receiving the death penalty in a white-victim case is between 18 and 23 percentage points. R 1294, 1738-40, GW 5, Fig. 2. If a particular aggravating circumstance were left out in coding McCleskey's case, it would affect the point where his case fell on the aggravation index. R 1747. Judging from the testimony of Officer Evans, McCleskey showed no remorse about the killing and, to the contrary, bragged about the killing while in jail. While both of these are variables

<sup>12</sup> This model has only one strength of the evidence factor (DCONFESS) and that occurs only in 26 percent of the cases. Many other aggravating and mitigating circumstances which the court has come to understand are significant in explaining the operation of the system in Georgia are omitted. Among these are that the homicide arose from a fight or that it was committed by lovers in a rage. A variable for family, lover, liquor, barroom quarrel is included, a d it might be argued that this is a proxy. However, the court notes from DB 60 that the included variable occurs in only 1,246 cases whereas the excluded variable (MADLOVER) occurs in 1,601 cases. Therefore, the universe of cases is not coextensive. Others which are excluded are variables showing that the victim was forced to disrobe; that the victim was found without clothing; that the victim was mutilated; that the defendant killed in a rage; that the killing was unnecessary to carry out the contemporaneous felony; that the defendant was provoked; that the defendant lacked the intent to kill; that the defendant left the scene of the crime; that the defendant resisted arrest; and that the vicim verbally provoked the defendant.

available in the data base, neither is utilized in the model. If either were included it should have increased McCleskey's index if either were coded correctly on McCleskey's questionnaire. Both variables on McCleskey's questionnaire were coded as "U," and so even if the variables had been included, McCleskey's aggravation index would not have increased because of the erroneous coding. If the questionnaire had been properly encoded and if either of the variables were included, McCleskey's aggravation index would have increased, although the court is unable to say to what degree. Judging from GW 8, if that particular factor had a coefficient as great as .15, the 39-variable or "mid-range" model would not have demonstrated any disparity in sentencing rates as a function of the race of the victim.

Katz conducted an experiment aimed at determining whether the uncertainty in sentencing outcome in midrange could be the result of imperfections of the model. He arbitrarily took the first 100 cases in the Procedural Reform Study. He then created five different models with progressively increasing numbers of variables. His six-variable model had an r2 of .26. His 31-variable model had an r2 of .95.13 Using these regression equations he computed the predictive outcome for each case using the aggravation index arrived at through his regression equations. As more variables were added, aggravation coefficients in virtually every case moved sharply toward 0 in life sentence cases and sharply toward 1 in death sentence cases. Respondent's Exhibit 40. In the five regression models designed by Katz, McCleskey's aggravation score, depending on the number of independent variables included, was .70, .75, 1.03, .87, and .85. R 1734, Res.Exh. 40.

<sup>&</sup>lt;sup>13</sup> Katz testified that in most cases he randomly selected variables and in the case of the 31-variable model selected those variables arbitrarily which would most likely predict the outcome in McCleskey's case.

Based on the foregoing the court is not convinced that the liberation hypothesis is at work in the system under study. Further, the court is not convinced that even if the hypothesis was at work in the system generally that it would suggest that impermissible factors entered into the decision to impose the death penalty upon McCleskey.

On another subject, Baldus testified that in a highly decentralized decision-making system it is necessary to the validation of a study to determine if the effects noted system-wide obtain when one examines the decisions made by the compartmentalized decision-makers. R 964-69. An analysis was done to determine if the racial disparities would persist if decisions made by urban decision-makers were compared with decisions made by rural decision-makers.14 No statistically significant race of the victim or race of the defendant effect was observed in urban decision-making units. A .08 effect, significant at the .05 level, was observed for race of the victim in rural decision-making units, but when logistic regression analvsis was used, the effect became statistically insignificant. The race of the defendant effect in the rural area was not statistically significant. The decisions in McCleskey's case were made by urban decision-makers.

Finally, the court makes the following findings with reference to some of the other models utilized by petitioner's experts. As noted earlier some were developed through a procedure called stepwise regression. What stepwise egression does is to screen the variables that are included in the analysis and include those variables which make the greatest net contribution to the r<sup>2</sup>. The computer program knows nothing about the nature of those variables and is not in a position to evaluate whether or not the variable logically would make a dif-

<sup>&</sup>lt;sup>14</sup> Based on the court's knowledge of the State of Georgia, it appears that Baldus included many distinctly rural jurisdictions in the category of urban jurisdictions.

ference. If the variables are highly correlated, the effect quite frequently is to drop variables which should not be dropped from a subject matter or substantive point of view and keep variables in that make no sense conceptually. So, stepwise regression can present a very misleading picture through the presentation of models which have relatively high  $r^2$  and have significant coefficients but which models do not really mean anything. R 1652. Because of this the court cannot accord any weight to any evidence produced by the model created by stepwise regression.

Woodworth conducted a number of tests on five models to determine if his measures of statistical significance were valid. As there were no validations of the models he selected and none can fairly be said on the basis of the evidence before the court to model the criminal justice system in Georgia, Woodworth's diagnostics provide little if any corroboration to the findings produced by such models. R 1252, et seq., GW 4, Table 1.

In Exhibits DB 96 and DB 97, outcomes which indicate racial disparities at the level of prosecutorial decision-making and jury decision-making are displayed. At the hearing the court had thought that the column under the Charging and Sentencing Study might be the product of a model which controlled for sufficient background variables to make it partially reliable. Since the hearing the court has consulted Schedule 8 of the Technical Appendix (DB 96A) and has determined that only eleven background variables have been controlled for, and many significant background variables are omitted from the model. The other models tested in DB 96 and 97 are similarly under-inclusive. (In this respect compare the variables listed on Schedule 8 through 13, inclusive, of the Technical Appendix with the variables listed in DB 59.) For this reason the court is of the opinion that DB 96 and DB 97 are probative of nothing.

## 10. The Fulton County Data.

McCleskey was charged and sentenced in Fulton County, Georgia. Recognizing that the impact of factors, both permissible and impermissible, do vary with the decision-maker, and recognizing that some cases in this circuit have required that the statistical evidence focus on the decisions where the sentence was imposed, petitioner's experts conducted a study of the effect of racial factors on charging and sentencing in Fulton

County.

The statistical evidence on the impact of racial variables is inconclusive. If one controls for 40 or 50 background variables, multiple regression analysis does not produce any statistically significant evidence of either a race of the defendant or race of the victim disparity in Fulton County. R 1000. Baldus used a stepwise regression analysis in an effort to determine racial disparities at different stages of the criminal justice system in the county. The stepwise regression procedure selected 23 variables. Baldus made no judgment at all concerning the appropriateness of the variables selected by the computer. The study indicated a statistically significant race of the victim and race of the defendant effect at the plea bargaining stage and at the stage where the prosecutor made the decision to advance the case to a penalty trial. Overall, there was no statistically significant evidence that the race of the victim or race of the defendant played any part in who received the death penalty and who did not. As a matter of fact, the coefficients for these two variables were very modestly negative which would indicate a higher death sentencing

<sup>15</sup> As part of its findings on the Fulton County data, the court finds that there are no guidelines in the Office of the District Attorney of the Atlanta Judicial Circuit to guide the exercise of discretion in determining whether or not to seek a penalty trial. Further, it was established that there was only one black juror on McCleskey's jury. R 1316.

rate in black-victim cases and in white-defendant cases. Neither of the coefficients, however, approach statistical significance. R 1037-49.

The same patterns observed earlier with reference to the relative aggravation and mitigation of white and black-victim cases, respectively, continue when the Fulton County data is reviewed. In Fulton County, as was the case statewide, cases in which black defendants killed white victims seemed to be more aggravated than cases in which white defendants killed white victims. R 1554, 1561, Res.Exh. 68.

Based on DB 114 and a near neighbor analysis, Baldus offered the opinion that in cases where there was a real risk of a death penalty one could see racial effects. R 1049-50. DB 114 is statistically inconclusive so far as the court can determine. The cohort study or near neighbor analysis also does not offer any support for Baldus's opinion. Out of the universe of cases in Fulton County Baldus selected 32 cases that he felt were near neighbors to McCleskey. These ran the gambit from locally notorious cases against Timothy Wes McCorquodale, Jack Carlton House, and Marcus Wayne Chennault, to cases that were clearly not as aggravated as McCleskey's case. Baldus then divided these 32 cases into three groups: More aggravated, equal to McCleskey, and less aggravated.

The court has studied the cases of the cohorts put in the same category as McCleskey and cannot identify either a race of the victim or race of the defendant disparity. All of the cases involve a fact pattern something like McCleskey's case in that the homicides were committed during the course of a robbery and in that the cases involve some gratuitous violence, such as multiple gunshots, etc. Except in one case, the similarities end there, and there are distinctive differences that can explain why either no penalty trial was held or no death sentence was imposed.

As noted above, Dr. Baldus established that the presence of the B10 factor, that is that the homicide was committed to stop or avoid an arrest, had an important predictive effect on the imposition of the death penalty. Also, the fact that the victim was a police officer had some predictive effect. Keeping these thoughts in mind, we turn to a review of the cases. Defendant Thornton's case (black defendant/black victim) did not involve a police officer. Further, Thornton was very much under the influence of drugs at the time of the homicide and had a history of a "distinct alcohol problem." In Dillard's case (black defendant/black victim) the homicide was not necessary to prevent an arrest and the victim was not a police officer. Further, Dillard's prior record was less serious than McCleskey's. In Leach's case (black defendant/black victim) the homicide was not committed to prevent an arrest and the victim was not a police officer. Further, Leach had only one prior felony and that was for motor vehicle theft. Leach went to trial and went through a penalty trial. Nowhere in the coder's summary is there any information available on Leach's defense or on any evidence of mitigation offered.

In the case of Gantt (black defendant/white victim) the homicide was not committed to avoid an arrest and the victim was not a police officer. Further, Gantt relied on an insanity defense at trial and had only one prior conviction. Crouch's case (white defendant/white victim) did not involve a homicide committed to prevent an arrest and the victim was not a police officer. Crouch's prior record was not as severe as McCleskey's and, unlike McCleskey, Crouch had a prior history of treatment by a mental health professional and had a prior history of habitual drug use. Further, and importantly, the evidence contained in the summary does not show that Crouch caused the death of the victim.

Arnold is a case involving a black defendant and a white victim. The facts are much the same as McCleskey's except that the victim was not a police officer but was a storekeeper. Arnold's case is aggravated by the fact that in addition to killing the victim, he shot at three bystander witnesses as he left the scene of the robbery, and he and his co-perpetrators committed another armed robbery on that day. Arnold was tried and sentenced to death. Henry's case (black defendant/white victim) did not involve a homicide to escape an arrest or a police victim. Henry's prior record was not as serious as McCleskey's, and, from the summary, it would appear that there was no direct evidence that the defendant was the triggerman, nor that the State considered him to be the triggerman.

In sum, it would seem to the court that Arnold and McCleskey's treatments were proportional and that their cases were more aggravated and less mitigated than the other cases classified by Baldus as cohorts. This analysis does not show any effect based either upon race of the defendant or race of the victim. See generally R 985-99, DB 110.

Another type of cohort analysis is possible using Fulton County data. There were 17 defendants charged in connection with the killing of a police officer since Furman. Six of those in Baldus's opinion were equally aggravated to McCleskey's case. Four of the cases involved a black defendant killing a white officer; two involved a black defendant killing a black officer; and one involved a white defendant killing a white officer. There were two penalty trials. McCleskey's involved a black defendant killing a white officer; the other penalty trial involved a black defendant killing a black officer. Only McCleskey received a death sentence. Three of the offenders pled guilty to murder, and two went to trial and were convicted and there was no penalty trial. On the basis of this data and taking the liberation hypothesis into account, Baldus expressed the opinion that a racial factor could have been considered, and that factor might have tipped the scales against McCleskey. R 1051-56, DB 116. The court considers this opinion unsupported conjecture by Baldus.

## D. Conclusions of Law

Based upon the legal premises and authorities set out above the court makes these conclusions of law.

The petitioner's statistics do not demonstrate a prima facie case in support of the contention that the death penalty was imposed upon him because of his race, because of the race of the victim, or because of any Eighth Amendment concern. Except for analyses conducted with the 230-variable model and the 250-variable model, none of the other models relied upon by the petitioner account to any substantial degree for racially neutral variables which could have produced the effect observed. The statewide data does not indicate the likelihood of discriminatory treatment by the decision-makers who sought or imposed the death penalty and the Fulton County data does not produce any statistically significant evidence on a validated model nor any anecdotal evidence that race of the victim or race of the defendant played any part in the decision to seek or impose the death penalty on McCleskey.

The data base for the studies is substantially flawed, and the methodology utilized is incapable of showing the result of racial variables on cases similarly situated. Further, the methods employed are incapable of disclosing and do not disclose quantitatively the effect, if any, that the two suspect racial variables have either state-wide, county-wide or in McCleskey's case. Accordingly, a court would be incapable of discerning the degree of disparate treatment if there were any. Finally, the largest models utilized are insufficiently predictive to give adequate assurances that the presence of an effect by the two racial variables is real.

Even if it were assumed that McCleskey had made out a prima facie case, the respondent has shown that the results are not the product of good statistical methodology and, further, the respondent has rebutted any prima facie case by showing the existence of another explanation for the observed results, i.e., that white victim cases are acting as proxies for aggravated cases and that black victim cases are acting as proxies for mitigated cases. Further rebuttal is offered by the respondent in its showing that the black-victim cases being left behind at the life sentence and voluntary manslaughter stages, are less aggravated and more mitigated than the white-victim cases disposed of in similar fashion.

Further, the petitioner has failed to carry his ultimate burden of persuasion. Even in the state-wide data, there is no consistent statistically significant evidence that the death penalty is being imposed because of the race of the defendant. A persistent race of the victim effect is reported in the state-wide data on the basis of experiments performed utilizing models which do not adequately account for other neutral variables. These tables demonstrate nothing. When the 230-variable model is utilized, a race of the victim and race of the defendant effect is demonstrated. When all of the decisions made throughout the process are taken into account it is theorized but not demonstrated that the point in the system at which these impermissible considerations come into play is at plea bargaining. The study, however, is not geared to, nor does it attempt to control for other neutral variables to demonstrate that there is unfairness in plea bargaining with black defendants or killers of white victims. In any event, the petitioner's study demonstrates that at the two levels of the system that matter to him, the decision to seek the death penalty and the decision to impose the death penalty, there is no statistically significant evidence produced by a reasonably comprehensive model that prosecutors are seeking the death penalty or juries are imposing the death penalty because the defendant is black or the victim is white. Further, the petitioner concedes that his study is incapable of demonstrating that he, specifically, was singled out for the death penalty because of the race of either himself or his victim. Further, his experts have testified that neither racial variable preponderates in the decisionmaking and, in the final analysis, that the seeking or the imposition of the death penalty depends on the presence of neutral aggravating and mitigating circumstances. For this additional reason, the court finds that even accepting petitioner's data at face value, he has failed to demonstrate that racial considerations caused him to receive the death penalty.

For these, among other, reasons the court denies the

petition for a writ of habeas corpus on this issue.

# III. CLAIM "A"-THE GIGLIO CLAIM.

Petitioner asserts that the failure of the State to disclose an "understanding" with one of its key witnesses regarding pending criminal charges violated petitioner's due process rights. In Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763, L.Ed.2d 104 (1971) the Supreme Court stated:

As long ago as Mooney v. Holohan, 294 U.S. 103, 112 [55 S.Ct. 340, 341, 79 L.Ed. 791] (1935), this Court made clear that deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with "rudimentary demands of justice." This was reaffirmed in Pyle v. Kansas, 317 U.S. 213 [63 S.Ct. 177, 87 L.Ed. 214] (1942). In Napue v. Illinois, 360 U.S. 264 [79 S.Ct. 1173, 3 L.Ed.2d 1217] (1959), we said, "[t]he same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." Id. at 269 [79 S.Ct. at 1177]. Thereafter Brady v. Maryland, 373 U.S. [83], at 87 [83 S.Ct. at 1194, 10 L.Ed.2d 215], held that suppression of material evidence justifies a new trial "irrespective of the good faith or bad faith of the prosecution." See American Bar Association, Project on Standards for Criminal Justice, Prosecution Function and the Defense Function § 3.11(a). When the "reliability of a given witness may well be determinative of guilt or innocence," nondisclosure of evidence affecting credibility falls within this general rule. 405 U.S. 150, 153-54, 92 S.Ct. 763, 765-66, 31 L.Ed. 104.

In Giglio an Assistant United States Attorney had promised leniency to a co-conspirator in exchange for his testimony against defendant. However, the Assistant U.S. Attorney who handled the case at trial was unaware of this promise of leniency and argued to the jury that the witness had "received no promises that he would not be indicted." The Supreme Court held that neither the Assistant's lack of authority nor his failure to inform his superiors and associates was controlling. The prosecution's duty to present all material evidence to the jury was not fulfilled and thus constituted a violation of due process requiring a new trial. Id. at 150, 92 S.Ct. at 763.

It is clear from Giglio and subsequent cases that the rule announced in Giglio applies not only to traditional deals made by the prosecutor in exchange for testimony but also to any promises or understandings made by any member of the prosecutorial team, which includes police investigators. See United States v. Antone, 603 F.2d 566, 569 (5th Cir.1979) (Giglio analysis held to apply to understanding between investigators of the Florida Department of Criminal Law Enforcement and the witness in a federal prosecution). The reason for giving Giglio such a broad reach is that the Giglio rule is designed to do more than simply prevent prosecutorial misconduct. It is also a rule designed to insure the integrity of the truthseeking process. As the Fifth Circuit stated in United States v. Cawley, 481 F.2d 702 (5th Cir.1973), "[w]e read Giglio and [United States v.] Tashman and Goldberg (sic) [478 F.2d 129 (5th Cir., 1973)] to mean simply that the jury must be apprised of any promise which induces a key government witness to testify on the government's behalf." Id. at 707. More recently, the Eleventh Circuit has stated:

The thrust of Giglio and its progeny has been to ensure that the jury know the facts that might moti-

vate a witness in giving testimony, and that the prosecutor not fraudulently conceal such facts from the jury. We must focus on "the impact on the jury." Smith v. Kemp, 715 F.2d 1459, 1467 (11th Cir.1983) (quoting United States v. Anderson, 574 F.2d 1347, 1356 (5th Cir.1978)).

In the present case the State introduced at petitioner's trial highly damaging testimony by Offie Gene Evans, an inmate of Fulton County Jail, who had been placed in solitary confinement in a cell adjoining petitioner's. Although it was revealed at trial that the witness had been charged with escaping from a federal halfway house, the witness denied that any deals or promises had been made concerning those charges in exchange for his testimony.<sup>16</sup>

<sup>16</sup> On direct examination the prosecutor asked:

Q: Mr. Evans have I promised you anything for testifying today?

A: No, sir, you ain't.

Q: You do have an escape charge still pending, is that correct?

A: Yes, sir. I've got one, but really it ain't no escape, what the peoples out there tell me, because something went wrong out there so I just went home. I stayed at home and when I called the man and told him that I would be a little late coming in, he placed me on escape charge and told me there wasn't no use of me coming back, and I just stayed on at home and he come and picked me up.

Q: Are you hoping that perhaps you won't be prosecuted for that escape?

A: Yeah, I hope I don't, but I don't-what they tell me, they ain't going to charge me with escape no way.

Q: Have you asked me to try to fix it so you wouldn't get charged with escape?

A: No, sir.

Q: Have I told you I would try to fix it for you?

A: No, sir.

Trial Transcript at 868.

On cross-examination by petitioner's trial counsel Mr. Evans testified:

The jury was clearly left with the impression that Evans was unconcerned about any charges which were pending against him and that no promises had been made which would affect his credibility. However, at petitioner's state habeas corpus hearing Evans testified that one of the detectives investigating the case had promised to speak to federal authorities on his behalf.<sup>17</sup> It was further revealed that the escape charges pending against Evans were dropped subsequent to McCleskey's trial.

After hearing the testimony, the habeas court concluded that the mere ex parte recommendation by the detective did not trigger the applicability of Giglio. This, however, is error under United States v. Antone, 603 F.2d 566, 569 (5th Cir.1979) and cases cited therein. A prom-

The Court: Mr. Evans, let me ask you a question. At the time that you testified in Mr. McCleskey's trial, had you been promised anything in exchange for your testimony?

The Witness: No, I wasn't. I wasn't promised nothing about —I wasn't promised nothing by the D.A. But the Detective told me that he would—he said he was going to do it himself, speak a word for me. That was what the Detective told me.

By Mr. Stroup:

Q: The Detective told you that he would speak a word for you?

A: Yeah.

Q: That was Detective Dorsey?

A: Yeah.

Habeas Transcript at 122.

Q: Okay. Now, were you attempting to get your escape charges altered or at least worked out, were you expecting your testimony to be helpful in that?

A: I wasn't worrying about the escape charge. I wouldn't have needed this for that charge, there wasn't no escape charge.

Q: Those charges are still pending against you, aren't they?

A: Yeah, the charge is pending against me, but I ain't been before no Grand Jury or nothing like that, not yet. Trial Transcript at 882.

<sup>17</sup> At the habeas hearing the following transpired:

ise, made prior to a witness's testimony, that the investigating detective will speak favorably to federal authorities concerning pending federal charges is within the scope of Giglio because it is the sort of promise of favorable treatment which could induce a witness to testify falsely on behalf of the government. Such a promise of favorable treatment could affect the credibility of the witness in the eyes of the jury. As the court observed in United States v. Barham, 595 F.2d 231 (5th Cir.1979), cert. denied, 450 U.S. 1002, 101 S.Ct. 1711, 68 L.Ed.2d 205, the defendant is "entitled to a jury that, before deciding which story to credit, was truthfully apprised of any possible interest of any Government witness in testifying falsely." Id. at 243 (emphasis in original).

A finding that the prosecution has given the witness an undisclosed promise of favorable treatment does not necessarily warrant a new trial, however. As the Court-observed in *Giglio*:

We do not, however, automatically require a new trial whenever "a combing of the prosecutors' files after the trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict.
..." United States v. Keogh, 391 F.2d 138, 148 (C.A. 2 1968). A finding of materiality of the evidence is required under Brady, supra, at 87. A new trial is required if "the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury. . . ." 405 U.S. at 154, 92 S.Ct. at 766.

In *United States v. Anderson*, 574 F.2d 1347 (5th Cir. 1978), the court elaborated upon the standard of review to be applied in cases involving suppression of evidence impeaching a prosecution witness:

The reviewing court must focus on the impact on the jury. A new trial is necessary when there is any reasonable likelihood that disclosure of the truth would have affected the judgment of the jury, that is, when

there is a reasonable likelihood its verdict might have been different. We must assess both the weight of the independent evidence of guilt and the importance of the witness' testimony, which credibility affects. *Id.* at 1356.

In other cases the court has examined the extent to which other impeaching evidence was presented to the jury to determine whether or not the suppressed information would have made a difference. E.g., United States v. Antone, 603 F.2d 566 (5th Cir.1979).

In the present case the testimony of Evans was damaging to petitioner in several respects. First, he alone of all the witnesses for the prosecution testified that McCleskey had been wearing makeup on the day of the robbery. Such testimony obviously helped the jury resolve the contradictions between the descriptions given by witnesses after the crime and their in-court identifications of petitioner. Second, Evans was the only witness, other than the codefendant, Ben Wright, to testify that McCleskey had admitted to shooting Officer Schlatt. No murder weapon was ever recovered. No one saw the shooting. Aside from the damaging testimony of Wright and Evans that McCleskey had admitted the shooting, the evidence that McCleskey was the triggerman was entirely circumstantial. Finally, Evans' testimony was by far the most damaging testimony on the issue of malice.18

<sup>&</sup>lt;sup>18</sup> In his closing argument to the jury the prosecutor developed the malice argument:

He (McCleskey) could have gotten out of that back door just like the other three did, but he chose not to do that, he chose to go the other way, and just like Offie Evans says, it doesn't make any difference if there had been a dozen policemen come in there, he was going to shoot his way out. He didn't have to do that, he could have run out the side entrance, he could have given up, he could have concealed himself like he said he tried to do under one of the couches and just hid there. He could have done that and let them find him, here I am, peekaboo.

In reviewing all of the evidence presented at trial, this court cannot conclude that had the jury known of the promise made by Detective Dorsey to Offic Evans. that there is any reasonable likelihood that the jury would have reached a different verdict on the charges of armed robbery. Evans's testimony was merely cumulative of substantial other testimony that McCleskey was present at the Dixie Furniture Store robbery. However, given the circumstantial nature of the evidence that McCleskey was the triggerman who killed Officer Schlatt and the damaging nature of Evans's testimony as to this issue and the issue of malice, the court does find that the jury may reasonably have reached a different verdict on the charge of malice murder had the promise of favorable treatment been disclosed. The court's conclusion in this respect is bolstered by the fact that the trial judge, in charging the jury as to murder, instructed the jury that they could find the defendant guilty of either malice murder or felony murder. After approximately two hours of deliberation, the jury asked the court for further instructions on the definition of malice. Given the highly damaging nature of Evans's testimony on the issue of malice, there is a reasonable likelihood that disclosure of the promise of favorable treatment to Evans would have affected the judgment of the jury on this issue.19

He deliberately killed that officer on purpose. I can guess what his purpose was, I am sure you can guess what it was, too. He is going to be a big man and kill a police officer and get away with it. That is malice.

Trial Transcript at 974-75.

<sup>19</sup> Although petitioner has not made this argument, the court notes in passing that Evans' testimony at trial regarding the circumstances of his escape varies markedly from the facts appearing in the records of federal prison authorities. For example, the records show that Evans had been using cocaine and opium immediately prior to and during his absence from the halfway house. Petitioner's Exhibit D, filed June 25, 1982. Also, prison records show that upon being captured Evans told authorities he had been in Florida working undercover in a drug investigation. Petitioner's

As the Fifth Circuit observed in *United States v. Barham*, 595 F.2d 231 (5th Cir.), cert. denied, 450 U.S. 1002, 101 S.Ct. 1711, 68 L.Ed.2d 205 (1981), another case involving circumstantial evidence bolstered by the testimony of a witness to whom an undisclosed promise of favorable treatment had been given:

There is no doubt that the evidence in this case was sufficient to support a verdict of guilty. But the fact that we would sustain a conviction untainted by the false evidence is not the question. After all, we are not the body which, under the Constitution, is given the responsibility of deciding guilt or innocence. The jury is that body, and, again under the Constitution, the defendant is entitled to a jury that is not laboring under a Government-sanctioned false impression of material evidence when it decides the question of guilt or innocence with all its ramifications.

We reiterate that credibility was especially important in this case in which two sets of witnesses—all alleged participants in one or more stages of a criminal enterprise—presented irreconcilable stories. Barham was entitled to a jury that, before deciding which story to credit, was truthfully apprised of any possible interest of any Government witness in testifying falsely. Knowledge of the Government's promises to Joey Shaver and Diane and Jerry Beech would have given the jury a concrete reason to believe that those three witnesses might have fabricated testimony

Exhibit E, filed June 25, 1982. These facts, available to the prosecutorial team but unknown to the defense, contradict Evans' belittling of his escape. See Note 1, supra. The prosecution allowed Evans' false testimony to go uncorrected, and the jury obtained a materially false impression of his credibility. Under these circumstances the good faith or bad faith of the prosecution is irrelevant. Brady v. Maryland, 373 U.S. 83, 87, 83 S.Ct. 1194, 1196, 10 L.Ed.2d 215 (1963); Napue v. Illinois, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959).

in order to avoid prosecution themselves or minimize the adverse consequences of prosecution. . . And the subsequent failure of the Government to correct the false impression given by Shaver and the Beeches shielded from jury consideration yet another, more persuasive reason to doubt their testimony—the very fact that they had attempted to give the jury a false impression concerning promises from the Government. In this case, in which credibility weighed so heavily in the balance, we cannot conclude that the jury, had it been given a specific reason to discredit the testimony of these key Government witnesses, would still have found that the Government's case and Barham's guilt had been established beyond a reasonable doubt. Id. at 242-43 (emphasis in original).

Because disclosure of the promise of favorable treatment and correction of the other falsehoods in Evans' testimony could reasonably have affected the jury's verdict on the charge of malice murder, petitioner's conviction and sentence on the charge are unconstitutional.<sup>20</sup> The writ of habeas corpus must therefore issue.

#### IV. CLAIM "C"-THE SANDSTROM CLAIM.

Petitioner claims that the trial court's instructions to the jury deprived him of due process because they unconstitutionally relieved the prosecution of its burden of proving beyond a reasonable doubt each and every essential element of the crimes for which defendant was convicted. Specifically, petitioner objects to that portion of the trial court's charge which stated:

<sup>28</sup> Nothing the court says in this part of the opinion is meant to imply that tioner's confinement for consecutive life sentences on his armed robbery convictions is unconstitutional. The court holds only that the conviction and sentence for murder are unconstitutional.

One section of our law says that the acts of a person of sound mind and discretion are presumed to be the product of the person's will, and a person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts, but both of these presumptions may be rebutted.<sup>21</sup> Trial Transcript at 996.

Now, the defendant enters upon the trial of this case, of all three charges set forth in the indictment, with the presumption of innocence in his behalf, and that presumption remains with him throughout the trial of the case unless and until the State introduces evidence proving the defendant's guilt of one or more or all of the charges beyond a reasonable doubt.

The burden rests upon the state to prove the case by proving the material allegations of each count to your satisfaction and beyond a reasonable doubt. In determining whether or not the state has carried that burden you would consider all the evidence that has been introduced here before you during the trial of this case.

Now, in every criminal prosecution, ladies and gentlemen, criminal intent is a necessary and material ingredient thereof. To put it differently, a criminal intent is a material and necessary ingredient in any criminal prosecution.

I will now try to explain what the law means by criminal intent by reading you two sections of the criminal code dealing with intent, and I will tell you how the last section applies to you, the jury.

One section of our law says that the acts of a person of sound mind and discretion are presumed to be the product of the person's will, and a person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts, but both of these presumptions may be rebutted.

I charge you, however, that a person will not be presumed to act with criminal intention, but the second code section says that the trier of facts may find such intention upon consideration of the words, conduct, demeanor, motive and all other

<sup>21</sup> The relevant portions of the trial court's jury instructions are set forth below. The portions to which petitioner objects are underlined.

It is now well established that the due process clause "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In Re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). Jury instructions which relieve the prosecution of this burden or which shift to the accused

circumstances connected with the act for which the accused is prosecuted.

Now, that second code section I have read you as the term the trier of facts. In this case, ladies and gentlemen, you are the trier of facts, and therefore it is for you, the jury, to determine the question of facts solely from your determination as to whether there was a criminal intention on the part of the defendant, considering the facts and circumstances as disclosed by the evidence and deductions which might reasonably be drawn from those facts and circumstances.

Now, the offense charged in Count One of the indictment is murder, and I will charge you what the law says about murder.

I charge you that a person commits murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being. Express malice is that deliberate intention to take away the life of a fellow creature which is manifested by external circumstances capable of proof. Malice shall be implied when no considerable provocation appears and where all the circumstances of the killing show an abandoned and malignant heart. That is the language of the law, ladies and gentlemen.

I charge you that legal malice is not necessarily ill-will or hatred. It is the intention to unlawfully kill a human being without justification or mitigation, which intention, however, must exist at the time of the killing as alleged, but it is not necessary for that intention to have existed for any length of time before the killing.

In legal contemplation a man may form the intention to kill a human being, do the killing instantly thereafter, and regret the deed as soon as it is done. In other words, murder is the intentional killing of a human being without justification or mitigation.

Trial Transcript, 988, 996-97, 998-99.

the burden of persuasion on one or more elements of the crime are unconstitutional. Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979); Mullaney v. Wilbur, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975).

In analyzing a Sandstrom claim the court must first examine the crime for which the petitioner has been convicted and then examine the complained-of charge to determine whether the charge unconstitutionally shifted the burden of proof on any essential element of the crime. See Lamb v. Jernigan, 683 F.2d 1332, 1335-36 (11th Cir. ... 1982), cert. denied, — U.S. —, 103 S.Ct. 1276, 75 L.Ed.2d 496 (1983). If the reviewing court determines that a reasonable juror would have understood the instruction either to relieve prosecution of its burden of proof on an essential element of the crime or shift to the defendant the burden of persuasion on that element the conviction must be set aside unless the reviewing court can state that the error was harmless beyond a reasonable doubt. Lamb v. Jernigan, supra; Mason v. Balkcom, 669 F.2d 222 (5th Cir. Unit B 1982), cert. denied, — U.S. —, 103 S.Ct. 1260, 75 L.Ed.2d 487 (1983).22

<sup>22</sup> Whether a Sandstrom error can be held to be harmless remains an open question at this time. The Supreme Court expressly left open in Sandstrom the question of whether a burden-shifting jury instruction could ever be considered landless. 442 U.S. at 526-27, 99 S.Ct. at 2460-61. The courts of this circuit have held that where the Sandstrom error is harmless beyond a reasonable doubt a reversal of the conviction is not warranted. See, e.g., Lamb v. Jernigan, 683 F.2d 1332, 1342-43 (11th Cir. 1982). In Connecticut v. Johnson, - U.S. -, 103 S.Ct. 969, 74 L.Ed.2d 823 (1983), the Supreme Court granted certiorari to resolve the question of whether a Sandstrom error could ever be considered harmless. Four Justices specifically held that the test of harmlessness employed by this circuit-whether the evidence of guilt was so overwhelming that the errone us instruction could not have contributed to the jury's verdict-was inappropriate. Id. 103 S.Ct. at 977. However, an equal number of justices dissented from this holding. Id. at 979 (Powell, J., joined by Burger, C.J., Rehnquist and O'Connor, J.J., dissenting). The tie-breaking vote was cast by

Petitioner was convicted of armed robbery and malice murder. The offense of armed robbery under Georgia law contains three elements: (1) A taking of property from the person or the immediate presence of a person, (2) by use of an offensive weapon, (3) with intent to commit theft. The offense of murder also contains three essential elements: (1) A homicide; (2) malice aforethought; and (3) unlawfulness. See Lamb v. Jernigan, supra; Holloway v. McElroy, 632 F.2d 605, 628 (5th Cir. 1980), cert. denied, 451 U.S. 1028, 101 S.Ct. 3019, 69 L.Ed.2d 398 (1981). The malice element, which distinguishes murder from the lesser offense of voluntary manslaughter, means simply the intent to kill in the absence of provocation. In Lamb v. Jernigan the court concluded that "malice, including both the intent component and the

Justice Stevens who concurred in the judgment on jurisdictional grounds. Id. at 978 (Stevens, J., concurring in the judgment).

Because a majority of the Supreme Court had not declared the harmless error standard employed in this circuit to be erroneous, the Eleventh Circuit has continued to hold that Sandstrom errors may be analyzed for harmlessness. See Spencer v. Zant, 715 F.2d 1562 (11th Cir. 1983).

<sup>&</sup>lt;sup>23</sup> Georgia Code Ann. § 26-1902 (now codified at O.C.G.A. § 16-8-41) provides in pertinent part:

<sup>(</sup>a) A person commits armed robbery when, with intent to commit theft, he takes property of another from the person or the immediate presence of another by use of an offensive weapon.

<sup>&</sup>lt;sup>24</sup> Georgia Code Ann. § 26-1101 (now codified at O.C.G.A. § 16-5-1) defines the offense of murder as follows:

<sup>(</sup>a) A person commits the offense of murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being.

<sup>(</sup>b) Express malice is that deliberate intention unlawfully to take away the life of a fellow creature which is manifested by external circumstances capable of proof. Malice shall be implied where no considerable provocation appears and where all the circumstances of the killing show an abandoned and malignant heart.

lack of provocation or justification, is an essential element of murder under Ga.Code Ann. § 26-1101(a) that Mullaney and its progeny require the State to prove beyond a reasonable doubt." 683 F.2d at 1337. Since the intent to commit theft is an essential element of the offense of armed robbery, the State must also prove this element beyond a reasonable doubt.

In analyzing the jury instructions challenged in the present case to determine whether they unconstitutionally shift the burden of proof on the element of intent, the court has searched for prior decisions in this circuit analyzing similar language. These decisions, however, provide little guidance for they reach apparently opposite results on virtually identical language. In Sandstrom the Supreme Court invalidated a charge which stated that "[t]he law presumes that a person intends the ordinary consequences of his acts," 442 U.S. at 513, 99 S.Ct. at 2453. The Court held that the jury could have construed this instruction as either creating a conclusive presumption of intent once certain subsidiary facts had been found or shifting to the defendant the burden of persuasion on the element of intent. The Court held both such effects unconstitutional. Like the instruction in Sandstrom, the instruction at issue in the present case stated that "the acts of a person of sound mind and discretion are presumed to be the product of the person's will, and a person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts, but both of these presumptions may be rebutted." This presumption would appear on its face to shift the burden of persuasion to the defendant. It does not contain the permissive language (intent "may be presumed when it would be the natural and necessary consequence of the particular acts.") which the Lamb court ruled created only a permissive inference rather than a mandatory presumption. Rather, the instruction at issue here states that a person is presumed to intend the natural and probable consequences of his acts. On

its face this instruction directs the jury to presume intent unless the defendant rebuts it. This would appear to be the sort of burden-shifting instruction condemned by Sandstrom. This conclusion is supported by Franklin v. Francis, 720 F.2d 1206 (11th Cir. 1983) which held that language virtually identical to that involved in the present case 25 violated Sandstrom. In that case the court declared:

This is a mandatory rebuttable presumption, as described in Sandstrom, since a reasonable juror could conclude that on finding the basic facts (sound mind and discretion) he must find the ultimate fact (intent for the natural consequences of an act to occur) unless the defendant has proven the contrary by an undefined quantum of proof which may be more than "some" evidence. 720 F.2d at 1210.

However, in Tucker v. Francis, 723 F.2d 1504 (11th Cir. 1984) another panel of the Eleventh Circuit, including the author of the Franklin opinion, reviewed language identical to that in Franklin and concluded that it created no more than a permissive inference and did not violate Sandstrom. The court in Tucker relied upon the fact that the trial judge instructed the jury in other parts of his charge that criminal intent was an essential element of the crime and was a fact to be determined by the jury. The court also focused on the fact that the charge also stated that "a person will not be presumed to act with criminal intention, but the trier of fact, that is you the jury, may find such intention upon considera-

<sup>25</sup> In Franklin the trial court charged the jury that:

<sup>[</sup>t]he acts of a person of sound mind and discretion are presumed to be the product of the person's will, but the presumption may be rebutted. A person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts, but the presumption may be rebutted.

tion of the words, conduct, demeanor, motive and all other circumstances connected with the act for which the accused is prosecuted." Tucker, supra, at 1517. Examining the objectionable language in the context of the entire instruction under Cupp v. Naughten, 414 U.S. 141, 94 S.Ct. 396, 38 L.Ed.2d 368 (1973), the court concluded that the instruction would not unconstitutionally mislead the jury as to the prosecution's burden of proof. Tucker, supra, at 1517. The problem with the reasoning is that the exact same instructions were contained in the charge given to the jury in Franklin v. Francis. See Franklin v. Francis, 720 F.2d at 1208 n. 2. This court can find no principled way of distinguishing between the charges at issue in Franklin and in Tucker and can discern no reason why the charge in Franklin would create a mandatory rebuttable presumption while the charge in Tucker could create only a permissive inference. The Tucker court did not explain this inconsistency and in fact did not even mention Franklin.

The charge at issue in the present case is virtually identical to those involved in Franklin and in Tucker. This court is bound to follow Tucker v. Francis, which is the latest expression of opinion on this subject by this circuit. The court holds that the instruction complained of in this case, taken in the context of the entire charge to the jury, created only a permissive inference that the jury could find intent based upon all the facts and circumstances of the case and thus did not violate Sandstrom. Tucker v. Francis, supra.

Having held that the instruction was not unconstitutional under Sandstrom, there is no need to examine the issue of harmlessness. However, the court expressly finds that even if the challenged instructions violated Sandstrom, the error was harmless beyond a reasonable doubt. The jury had overwhelming evidence that petitioner was present at the robbery and that he was the only one of the robbers in the part of the store from which the shots were fired. The jury also had evi-

dence that he alone of the robbers was carrying the type of weapon that killed Officer Schlatt. Finally, the jury had the testimony of Ben Wright and Officer Schlatt McCleskey had not only admitted killing Officer Schlatt but had even boasted of his act. Looking at the totality of the evidence presented and laying aside questions of credibility which are the proper province of the jury, this court cannot conclude that there is any reasonable likelihood that the intent instruction, even if erroneous, contributed to the jury's decision to convict petitioner of malice murder and armed robbery. Petitioner's Sandstrom claim is, therefore, without merit.

#### V. CLAIM "L"—PROSECUTORIAL MISCONDUCT AT THE SENTENCING PHASE.

In this claim petitioner argues that the Assistant District Attorney improperly referred to the appellate process during his arguments to the jury at the sentencing phase of petitioner's trial.<sup>26</sup> References to the

Now, what should you consider as you are deliberating the second time here, and I don't know what you are going to consider.

I would ask you, however, to consider several things. Have you observed any remorse being exhibited during this trial by Mr. McCleskey? Have you observed any remorse exhibited while he was testifying?

Have you observed any repentance by Mr. McCleskey, either visually as you look at him now or during the trial or during the time that he testified? Has he exhibited to you any sorrow, both visually or during the time that he was testifying?

Have you seen any tears in his eyes for this act that he has done?

I would also ask you to consider the prior convictions that you have had with you in the jury room, and particularly the one where he got three convictions. I believe if you look at those papers carefully you are going to find, I think, on one of those he got three life sentences to begin with, and then there is a cover sheet where apparently that was reduced to what,

<sup>26</sup> The relevant portion of the prosecutor's argument to the jury in favor of the death penalty is set forth below:

appellate process are not per se unconstitutional unless on the record as a whole it can be said that it rendered

eighteen years or fifteen years or something, which means of course, he went through the appellate process and somehow got it reduced.

Now, I ask you to consider that in conjunction with the life that he has set for himself. You know, I haven't set his goals, you haven't set his goals, he set his own goals, and here is a man that served considerable periods of time in prison for armed robbery, just like Ben Wright said, you know, that is his profession and he gets in safely, takes care of the victims, although he may threaten them, and gets out safely, that is what he considers doing a good job, but of course you may not agree with him, but that is job safety.

I don't know what the Health, Education and Welfare or whatever organization it is that checks on job safety would say, but that is what Mr. Ben Wright considers his responsibility.

Now, apparently Mr. McCleskey does not consider that his responsibility, so consider that. The life that he has set for himself, the direction he has set his sails, and thinking down the road, are we going to have to have another trial sometime for another peace officer, another corrections officer, or some innocent bystander who happens to walk into a store, or some innocent person who happens to be working in the store who makes the wrong move, who makes the wrong turn, that makes the wrong gesture, that moves suddenly and ends up with a bullet in their head?

This has not been a pleasant task for me, and I am sure it hasn't been a pleasant task for you. I would have preferred that some of the other Assistants downstairs be trying this case, I would prefer some of the others be right here now, instead of me, and I figure a lot of you are figuring why did I get on this jury, why not some of the other jurors, let them make the decision.

I don't know why you are here, but you are here and I have to be here. It has been unpleasant for me, but that is my duty. I have tried to do it honorably and I have tried to do it with justice. I have no personal animosity toward Mr. McCleskey, I have no words with him, I don't intend to have any words with him, but I intend to follow what I consider to be my duty, my honor and justice in this case, and I ask you to do the same thing, that you sentence him to die, and that you find aggravating circumstances, both of them, in this case.

Transcript at 1019-21.

the entire trial fundamentally unfair. McCorquodale v. Balkcom, 705 F.2d 1553, 1556 (11th Cir. 1983); Corn v. Zant, 708 F.2d 549, 557 (11th Cir.1983).

The prosecutor's arguments in this case did not intimate to the jury that a death sentence could be reviewed or set aside on appeal. Rather, the prosecutor's argument referred to petitioner's prior criminal record and the sentences he had received. The court cannot find that such arguments had the effect of diminishing the jury's sense of responsibility for its deliberations on petitioner's sentence. Insofar as petitioner claims that the prosecutor's arguments were impermissible because they had such an effect, the claim is without merit.<sup>27</sup>

# VI. CLAIM "B"—TRIAL COURT'S REFUSAL TO PROVIDE PETITIONER WITH FUNDS TO RETAIN HIS OWN EXPERT WITNESS.

Petitioner contends that the trial court's refusal to grant funds for the employment of a ballistics expert to impeach the testimony of Kelley Fite, the State's ballistics expert, denied him due process. This claim is clearly without merit for the reasons provided in *Moore* v. Zant, 722 F.2d 640 (11th Cir.1983).

Under Georgia law the appointment of an expert in a case such as this ordinarily lies within the dis-

<sup>&</sup>lt;sup>27</sup> Although the point has not been argued by either side and is thus not properly before the court, the prosecutor's arguments may have been impermissible on the grounds that they encouraged the jury to take into account the possibility that petitioner would kill again if given a life sentence. Such "future victims" arguments have recently been condemned by the Eleventh Circuit on the grounds that they encourage the jury to impose a sentence of death for improper or irrelevant reasons. See Tucker v. Francis, 723 F.2d 1504 (11th Cir. 1984); Brooks v. Francis, 716 F.2d 780 (11th Cir. 1983); Hance v. Zant, 696 F.2d 940 (11th Cir. 1983). The court makes no intimation about the merits of such an argument and makes mention of it only for the purpose of pointing out that it has not been raised by fully competent counsel.

Ga. 163, 269 S.E.2d 436 (1980). In this case the State presented an expert witness to present ballistics evidence that the bullet which killed Officer Schlatt was probably fired from a gun matching the description of the gun petitioner had stolen in an earlier robbery and which matched the description of the gun several witnesses testified the petitioner was carrying on the day of the robbery at the Dixie Furniture Company. Petitioner had ample opportunity to examine the evidence prior to trial and to subject the expert to a thorough cross-examination. Nothing in the record indicates that the expert was biased or incompetent. This court cannot conclude therefore that the trial court abused its discretion in denying petitioner funds for an additional ballistics expert.

VII. CLAIM "D"—TRIAL COURT'S INSTRUC-TIONS REGARDING USE OF EVIDENCE OF OTHER CRIMES AT GUILT STAGE OF PETITIONER'S TRIAL.

Petitioner claims that the trial court's instructions regarding the purposes for which the jury could examine evidence that petitioner had participated in other robberies for which he had not been indicted was overly broad and diminished the reliability of the jury's guilt determination.

During the trial the prosecution introduced evidence that petitioner had participated in armed robberies of the Red Dot Grocery Store and the Red Dot Fruit Stand. At that time the trial judge cautioned the jury that the evidence was admitted for the limited purpose of "aiding in the identification and illustrating the state of mind, plan, motive, intent and scheme of the accused, if in fact it does to the jury so do that." The evidence tended to establish that petitioner had participated in earlier armed robberies employing the same modus operandi and that in one of these robberies he had stolen

what was alleged to have been the weapon that killed Officer Schlatt. Such evidence is admissible under Georgia law. See Hamilton v. State, 239 Ga. 72, 235 S.E.2d 515 (1977). Petitioner objects that the trial court's instructions regarding the use of this evidence were overbroad because "(a) the prosecution itself had offered the evidence of other transactions for the purpose of showing the identity of the accused rather than to show intent or state of mind, and (b) it is irrational to instruct that evidence of an accused's participation in another transaction where a murder did not occur is probative of the accused's intent to commit malice murder." Petitioner's Memorandum of Law in Support of Issuance of the Writ at 10-11. Both of these contentions are without merit. First, the court sees nothing in the court's instructions to support petitioner's contention that the jury was allowed to find intent to commit malice murder from the evidence of the prior crimes. Petitioner was charged with armed robbery and murder. The evidence of the Red Dot Grocery Store robbery was admissible for the purpose of showing that petitioner had stolen the murder weapon. The evidence of the other armed robberies was admissible for the purpose of showing a common scheme or plan on the armed robbery count. Also, the evidence of the Red Dot Fruit Stand robbery was admitted for impeachment purposes only after the petitioner took the stand in his own defense. The court has read the trial court's instructions and cannot conclude that the instructions were overbroad or denied petitioner a fair trial. See Spencer v. Texas, 385 U.S. 554, 560-61, 87 S.Ct. 648, 651-52, 17 L.Ed.2d 606 (1967).28

<sup>&</sup>lt;sup>28</sup> The relevant portion of the trial judge's instructions to the jury were as follows:

Now, ladies and gentlemen, there was certain evidence that was introduced here, and I told you it was introduced for a limited purpose, and I will repeat the cautionary charge I gave you at that time.

I told you that in the prosecution of a particular crime, evidence which in any manner tends to show that the accused has com-

VIII. CLAIM "E"—EVIDENCE OF NON-STATU-TORY AGGRAVATING CIRCUMSTANCES PRESENTED AT PENALTY STAGE OF PETITIONER'S TRIAL.

Petitioner contends that the trial court erred by giving the jury complete, unlimited discretion to use any of the evidence presented at the trial during its deliberations regarding imposition of the death penalty. Petitioner's claim is without merit. The trial judge specifically instructed the jury that it could not impose the death penalty unless it found at least one statutory aggravating circumstance.<sup>20</sup> He also instructed the jury that if it

mitted another transaction, wholly distinct, independent and separate from that for which he is on trial, even though it may show a transaction of the same nature, with similar methods and in the same localities, it is admitted into evidence for the limited purpose of aiding in identification and illustrating the state of mind, plan, motive, intent and scheme of the accused, if, in fact, it does to the jury so do that.

Now, whether or not this defendant was involved in such similar transaction or transactions is a matter for you to determine. Furthermore, if you conclude that the defendant was involved in this transaction or these transactions, you should consider it solely with reference to the mental state of the defendant insofar as it is applicable to the charges set forth in the indictment, and the court in charging you this principle of law in no way intimates whether such transaction or transactions, if any, tend to illustrate the state of mind or intent of the defendant or aids in identification, that is a matter for you to determine.

Transcript at 992-93.

<sup>29</sup> The relevant portion of the judge's sentencing charge is printed below. The challenged portion is underlined.

I charge you that in arriving at your determination you must first determine whether at the time the crime was committed either of the following aggravating circumstances was present and existed beyond a reasonable doubt; one, that the offense of murder was committed while the offender was engaged in the commission of another capital felony, to wit, armed robbery; and two, the offense of murder was com-

found one or more statutory aggravating circumstances it could also consider any other mitigating or aggravating circumstances in determining whether or not the death

penalty should be imposed.

Georgia's capital sentencing procedure has been declared constitutional by the Supreme Court in Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). Just recently the Supreme Court examined an argument similar to the one petitioner makes here in Zant v. Stephens, — U.S. —, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983). In that case the Court dealt with the argument that allowing the jury to consider any aggravating circumstances

mitted against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.

Now, if you find one or both of these aggravating circumstances existed beyond a reasonable doubt, upon consideration of the offense of murder, then you would be authorized to consider imposing a sentence of death relative to that offense.

If you do not find beyond a reasonable doubt that one of the two of these aggravating circumstances existed with reference to the offense of murder, then you would not be authorized to consider the penalty of death, and in that event the penalty imposed would be imprisonment for life as provided by law.

In arriving at your determination of which penalty shall be imposed, you are authorized to consider all of the evidence received here in court, presented by the State and the defend-

ant throughout the trial before you.

You should consider the facts and circumstances in mitigation. Mitigating circumstances are those which do not constitute a justification or excuse for the offense in question, but which in fairness and mercy may be considered as extenuating or reducing the degree of moral culpability or blame.

Now, it is not mandatory that you impose the death penalty even if you should find one of the aggravating circumstances does exist or did exist. You could only impose the death penalty if you do find one of the two statutory aggravating circumstances I have submitted to you, but if you find one to exist or both of them to exist, it is not mandatory upon you to impose the death penalty.

Transcript, 1027-29.

once a statutory aggravating circumstance had been found allowed the jury unbridled discretion in determining whether or not to impose the death penalty on a certain class of defendants. The Court stated:

Our cases indicate, then, that statutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: They circumscribe the class of persons eligible for the death penalty. But the Constitution does not require the jury to ignore other possible aggravating factors in the process of selecting, from among that class, those defendants who will actually be sentenced to death. What is important at the selection stage is an individualized determination on the basis of the character of the individual and the circumstances of the crime. Zant v. Stephens, — U.S. —, 103 S.Ct. at 2743-44 [77 L.Ed.2d 235] (emphasis in original).

The court specifically approved in Zant v. Stephens consideration by the jury of non-statutory aggravating circumstances, provided that such evidence is not "constitutionally impermissible or totally irrelevant to the sentencing process, such as for example the race, religion or political affiliation of the defendant." Id. 103 S.Ct. at 2747.

The sentencing jury in this case found two statutory aggravating circumstances: (1) That the offense of murder had been committed while McCleskey was engaged in the commission of another capital felony; and (2) that the offense of murder was committed against a peace officer while engaged in the performance of his official duties. "The trial judge could therefore properly admit any 'additional evidence in extenuation, mitigation, and aggravation of punishment, including the record of any prior conviction,' . . . provided that the evidence bore on 'defendant's prior record, or circumstances of his offense,' "Moore v. Zant, 722 F.2d 640 at 644 (11th Cir.1983) (quoting Lockett v. Ohio, 438 U.S. 586, 604 n.12, 98 S.Ct. 2954, n.12, 57 L.Ed.2d 973 (1978)). For the reasons

stated in Zant v. Stephens, supra, and Moore v. Zant, supra, petitioner's claim is without merit.

IX. CLAIM "F"—WHETHER THE ADMISSION AT PETITIONER'S TRIAL OF EVIDENCE CONCERNING PRIOR CRIMES AND CONVICTIONS VIOLATED PETITIONER'S DUE PROCESS RIGHTS.

Petitioner contends that the admission of evidence concerning two prior armed robberies for which he had not been indicted and the admission of details of other prior armed robberies for which he had been convicted violated his due process rights. This court has already concluded in Part VII, supra, that the evidence that petitioner participated in prior armed robberies was properly admitted to show petitioner's scheme, motive, intent or design and that the trial judge's instructions properly limited the use of this evidence. See also McCleskey v. State, 245 Ga. 108, 114, 263 S.E.2d 146 (1980). The evidence to which petitioner objects most strongly in Claim "F" concerns details of prior armed robberies for which petitioner had been convicted. When petitioner took the stand in his own defense, he admitted on direct examination that he had previously been convicted of armed robbery. He admitted to being guilty of those crimes, gave the dates of the convictions and the sentences he had received. On crossexamination the Assistant District Attorney asked petitioner a number of questions concerning the details of those robberies.30 Petitioner contends that this questioning

<sup>30</sup> A portion of the cross-examination was as follows:

Q: Are you saying you were guilty or you were not guilty?

A: Well, I was guilty on this.

Q: Three counts of armed robbery?

A: Pardon me?

Q: You were guilty for the three counts of armed robbery?

A: Yes sir.

concerning the details of crimes to which petitioner had admitted guilt exceeded the bounds of what was permis-

30 [continued]

Q: How about the other two that you pled guilty to, were you guilty of those?

A: I was guilty on the Cobb County, but the others I was not guilty of, but I pleaded guilty to them anyway, because like I say, I didn't see no reason to go through a long process of fighting them, and I already had a large sentence.

Q: So you are guilty for the Douglas County armed robberies and the Cobb County robbery, but not the Fulton County robbery?

A: I pleaded guilty to it.

Q: To the Fulton County?

A: Sure.

Q: But are you guilty of that robbery?

A: I wasn't guilty of it, but I pleaded guilty to it.

Q: But you were guilty in all of the robberies in Cobb County and Douglas County, is that correct?

A: I have stated I am guilty for them, but for the ones in Fulton County, no, I wasn't guilty of it. I pleaded guilty to it because I didn't see no harm it could do to me.

Q: Now, one of those armed robberies in Douglas County, do you recall where that might have been?

A: You mean place?

Q: Yes, sir.

A: I know it was a loan company.

Q: Kennesaw Finance Company on Broad Street, is that about correct?

A: That sounds familiar.

Q: And did you go into that place of business at approximately closing time?

A: I would say yes.

Q: Did you tie the manager and the-the managers up?

A: No, I didn't do that.

Q: Did somebody tie them up?

A: Yes, sir.

Q: Did they curse those people?

A: Did they curse them?

sible for impeachment purposes, was irrelevant to the crimes for which he was being tried, and served to prej-

- 30 [continued]
  - Q: Yes, sir.
  - A: Not to my recollection.
  - Q: Did they threaten to kill those people?
  - A: Not to my recollection.
  - Q: Did somebody else threaten to kill them?
  - A: I don't remember anybody making any threats. I vaguely remember the incident, but I don't remember any threats being issued out.
  - Q: Now, the robbery in Cobb County, do you remember where that might have been.
  - A: Yes, sir, that was at Kennesaw Finance, I believe.
  - Q: And do you remember what time of day that robbery took place?
  - A: If I am not mistaken, I think it was on the 23rd day of July.
  - Q: 1970?
  - A: Right.
  - Q: About 4:30 p.m.?
  - A: Yes, sir.
  - Q: Were you found inside the store on the floor with a .32 caliber revolver?
  - A: Yes, sir, they caught me red-handed, I couldn't deny it.
  - Q: And did you arrive there with an automobile parked around the corner?
  - A: I didn't have an automobile.
  - Q: Did that belong to Harold McHenry?
  - A: McHenry had the autombile.
  - Q: And was he with you in the robbery?
  - A: Yes, sir.
  - Q: And was that automobile parked around the corner with the motor running?
  - A: At that time I don't know exactly where it was parked because I didn't get out right there around the corner, I got out of the street from the place and he was supposed to pick us up right there, but unfortunately he didn't make it.

[continued]

udice the jury against him. The Supreme Court of Georgia has already declared that this evidence was properly admitted under the Georgia Rules of Evidence. Petitioner asks this court now to declare the Georgia rule allowing the admissibility of this evidence to be violative of the due process clause of the Fourteenth Amendment.

In Beck v. Alabama, 447 U.S. 625, 100 S.Ct. 2382, 65

L.Ed.2d 392 (1980), the Supreme Court stated:

To insure that the death penalty is indeed imposed on the basis of "reason rather than caprice of emotion," we have invalidated procedural rules that tended to diminish the reliability of the sentencing determination. The same reasoning must apply to rules that diminish the reliability of the guilt determination. *Id.* at 638, 100 S.Ct. at 2390.

<sup>30 [</sup>continued]

Q: You also have been convicted out in DeKalb County, haven't you?

A: Yes, sir, I entered a plea out there. All of those charges stem from 1970.

Q: What did you plead guilty to out in De-Kalb County?

A: Robbery charge.

Q: Armed robbery?

A: Yes, sir.

Q: And where was that at, sir?

A: I don't know—I don't remember exactly where the robbery was supposed to have took place, but I remember entering a guilty plea to it.

Q: Were you guilty of that?

A: No, sir, I wasn't guilty of it. Like I said, I had spent money on top of money trying to fight these cases and I didn't see any need to continue to fight cases and try to win them and I have already got a large sentence anyway.

Q: I believe the DeKalb County case was out at the Dixie Finance Company out in Lithonia, is that correct?

A: I don't really recollect. I do remember the charge coming out, but I don't recall exactly what place it was.

Transcript 845-849.

In Beck the Supreme Court struck down an Alabama statute which prohibited a trial judge from instructing the jury in a murder case that it could find the defendant guilty of a lesser-included offense. The Court ruled that this statute distorted the factfinding function of the jury. "In the final analysis the difficulty with the Alabama statute is that it interjects irrelevant considerations into the factfinding process, diverting the jury's attention from the central issue of whether the State has satisfied its burden of proving beyond a reasonable doubt that the defendant is guilty of a capital crime." Id. at 642, 100 S.Ct. at 2392.

In Green v. Georgia, 442 U.S. 95, 99 S.Ct. 2150, 60 L.Ed.2d 738 (1979) the Supreme Court set aside a death sentence on the grounds that the state trial court had excluded certain hearsay testimony at the sentencing portion of petitioner's trial. In that case the Court stated:

Regardless of whether the proffered testimony comes within Georgia's hearsay rule, under the facts of this case its exclusion constituted a violation of the Due Process Clause of the Fourteenth Amendment. *Id.* at 96, 99 S.Ct. at 2151.

It seems clear from these cases that a state procedural or evidentiary rule which might substantially diminish the reliability of the factfinding function of the jury in a capital case would violate the due process clause of the Fourteenth Amendment. The question, then, is whether or not the admissibility of the details of other crimes can be said to have had the effect of diminishing "the reliability of the guilt determination." Petitioner has cited several cases from this and other circuits which have held that the admission in a federal prosecution of details of prior crimes to which the defendant had admitted guilt was unfairly prejudicial and constituted reversible error. See, e.g., United States v. Tumblin, 551 F.2d 1001 (5th Cir.1977); United States v. Harding, 525 F.2d 84 (7th Cir.1975) ("The rule that it is error to in-

quire about the details of prior criminal conduct is so well established that such error is cognizable despite the absence of any objection by defense counsel."). The point petitioner has overlooked is that prosecutions in federal court are governed by the Federal Rules of Evidence. Each of the cases petitioner has cited rely to a greater or lesser extent upon an interpretation of those rules. While the Federal Rules of Evidence embody a modern concept of fairness and due process, it is not for this court to say that they are the only embodiment of due process or the standard against which state rules of evidence must be judged. While the evidence presented at petitioner's trial would probably not have been admitted in a federal prosecution, this court cannot conclude that it was so seriously prejudicial that it undermined the reliability of the jury's guilt determination. Petitioner's Claim "F" is therefore without merit.

# X. CLAIM "M"—THE SUGGESTIVE LINEUP.

In this claim petitioner contends that he was shown to at least three witnesses for the State in an illegal and highly suggestive display immediately prior to his trial without the knowledge, consent, or presence of defense counsel. The Supreme Court of Georgia thoroughly addressed this concern and found against petitioner. *Mc-Cleskey v. State*, 245 Ga. 108, 110-12, 263 S.E.2d 146 (1980). In its discussion the Supreme Court of Georgia stated:

The record shows that four witnesses immediately prior to the call of the case saw the appellant and four other persons sitting in the jury box guarded by deputy sheriffs. Each of these witnesses testified that they recognized the appellant as one of the robbers at the time they saw him seated in the jury box. There is no indication that the witnesses were asked to view the man seated in the jury box and see if they recognized anyone. No one pointed out the appellant

as the defendant in the case, rather it is apparent from the witnesses' testimony that each recognized the appellant from having viewed him at the scene of the respective robberies. Therefore, no illegal postindictment lineup occurred. . . . .

Appellant argues further that the four witnesses viewing him in the jury box as he awaited trial along with police identification procedures impermissibly tainted the witnesses' in-court identification of the appellant.

The threshold inquiry is whether the identification procedure was impermissibly suggestive. Only if it was, need the court consider the second question: Whether there was a substantial likelihood of irreparable misidentification...

The chance viewing of the appellant prior to trial as he sat with others was no more suggestive than seeing him in the hall as he and other defendants are being brought in for trial, or seeing him seated at the defense table as each witness comes in to testify. We conclude that the chance viewing of the appellant immediately prior to trial by four of the State's witnesses was not impermissibly suggestive. Also we find the identifications were not tainted by police identification procedures. 245 Ga. at 110, 263 S.E.2d 146.

Although the court found that the display was not impermissibly suggestive, the court went on to examine whether the in-court identifications were reliable and found that they were. This court finds no basis in the record or in the arguments presented by petitioner for concluding that the Suupreme Court of Georgia was in error. The court therefore finds that petitioner's Claim "M" is without merit.

XI. CLAIM "N"—WHETHER PETITIONER'S STATEMENT INTRODUCED AT TRIAL WAS FREELY AND VOLUNTARILY GIVEN AFTER A KNOWING WAIVER OF PETITIONER'S RIGHTS.

In this claim petitioner contends that the admission at trial of his statements given to the police was error because the statements were not freely and voluntarily given after a knowing waiver of rights. Before the statement was revealed to the jury the trial court held, outside of the presence of the jury, a Jackson v. Denno hearing. The testimony at this hearing revealed that at the time he was arrested petitioner denied any knowledge of the Dixie Furniture Store robbery. He was detained overnight in the Marietta Jail. The next morning when two Atlanta police officers arrived to transfer him to Atlanta they advised him of his full Miranda rights. He again denied any knowledge of the Dixie Furniture Store robbery. There was some dispute about what was said during the half-hour trip back to Atlanta. Petitioner claimed that the officers told him that his co-defendants had implicated him and that if he did not start talking they would throw him out of the car. The officers, of course, denied making any such threat but did admit that they told petitioner that the other defendants were "trying to stick it on" him. The officers testified that during the trip back, after being fully advised of his Miranda rights and not being subjected to any coercion or threats, petitioner admitted his full participation in the robbery but denied that he shot Officer Schlatt.

Immediately upon arrival at the Atlanta Police Department petitioner was taken to Detective Jowers. At that time petitioner told Jowers that he was ready to talk. Detective Jowers had petitioner execute a written waiver of counsel. This waiver included full *Miranda* warnings and a statement that no threats or promises had been made to induce petitioner's signature. Petitioner's state-

ment was then taken over the next several hours. During the first part of this session petitioner simply narrated a statement to a secretary who typed it. The secretary testified that petitioner was dissatisfied with the first draft of the statement and started another one. The first draft was thrown away.

After petitioner finished his narration Detective Jowers proceeded to ask him a number of questions about the crime. This questioning went on for some time off the record. Finally, a formal question and answer session was held on the record. These questions and answers were typed up by the secretary and signed by petitioner.

It is undisputed that the atmosphere in the room where the statement was being taken was unusually relaxed and congenial, considering the gravity of the crime of which petitioner was accused. The secretary who typed it testified that she had never seen the police officers treat a murder suspect with such warmth.<sup>31</sup>

After hearing all of the testimony and considering petitioner's argument that the police had engaged in a "Mutt and Jeff" routine,<sup>32</sup> the trial court ruled that the statement had been freely and voluntarily given after a knowing waiver of petitioner's *Miranda* rights. The jury was then returned and the statement and testimony were then introduced.

After having read the transcript of the proceedings this court cannot conclude that the trial judge erred in his finding that the statement was freely and voluntarily given. There was no error, therefore, in admitting the

<sup>&</sup>lt;sup>31</sup> The officers gave petitioner cigarettes, potato chips, and soft drinks during the interrogation. They also at one point discussed with him the attractiveness of a particular female officer.

<sup>&</sup>lt;sup>32</sup> Such routines involve one group of officers acting hostile and threatening toward the defendant while another officer or group of officers seemingly befriends him and showers him with kindness. The rationale for such routines is that defendants often believe they have found a friend on the police force to whom they can tell their story.

statement in to evidence. Petitioner's Claim "N" is therefore without merit.

## XII. CLAIM "O"—EXCLUSION OF DEATH-SCRU-PLED JURORS.

Petitioner claims that the exclusion of two prospective jurors because of their opposition to the death penalty violated his Sixth Amendment rights under *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). Both jurors indicated that they would not under any circumstances consider the death penalty.<sup>33</sup>

## The testimony of Emma T. Cason was as follows:

<sup>33</sup> The examination of Miss Barbara J. Weston was as follows:

Q: Now, Miss Weston, are you conscientiously opposed to capital punishment?

A: Yes.

Q: Your opposition towards capital punishment, would that cause you to vote against it regardless of what the facts of the case might be?

A: Yes, I would say so, because of the doctrine of our church. We have a manual that we go by.

Q: Does your church doctrine oppose capital punishment?

A: Yes.

Q: So you would oppose the imposition of capital punishment regardless of what the facts would be?

A: Yes.

Q: You would not even consider that as one of the alternatives?

A: No, I wouldn't.

The Court: Mr. Turner, any questions you want to ask?

Mr. Turner: No questions from me.

The Court: Miss Weston, I will excuse you from this case. Transcript 98-99.

Q: Mrs. Cason, are you conscientiously opposed to capital punishment?

A: Yes.

In Witherspoon v. Illinois, supra, the Supreme Court held that a person could not be sentenced to death by a jury from which persons who had moral reservations about the death penalty had been excluded, unless those persons had indicated that their opposition to the death penalty would prevent them from fulfilling their oaths as jurors to apply the law:

[N]othing we say today bears upon the power of a State to execute a defendant sentenced to death by a jury from which the only veniremen who were in fact excluded for cause were those who made unmistakably clear (1) that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt. 391 U.S. at 522-23 n. 21, 88 S.Ct. at 1776-77 n. 21 (emphasis in original).

Since the two prospective jurors in this case indicated that they would not under any circumstances vote for the death

<sup>33 [</sup>continued]

Q: You are?

A: Yes.

Q: If you had two alternatives in a case as far as penalties go, that is, impose the death sentence or life penalty, could you at least consider the imposition of the death penalty?

A: I don't think so, no. I would have to say no.

Q: Under any circumstances you would not consider it?

A: No.

Mr. Parker: Thank you.
The Court: Any questions?
Mr. Turner: No questions.

The Court: Mrs. Cason, I will excuse you and let you return to the jury assembly room on the fourth floor.

Transcript 129-30.

penalty, the trial court committed no error in excluding them. See Boulden v. Holman, 394 U.S. 478, 89 S.Ct. 1138, 22 L.Ed.2d 433 (1969).

Petitioner's argument that the exclusion of deathscrupled jurors violated his right to be tried by a jury drawn from a representative cross section of his community has already been considered and rejected in this circuit. Smith v. Balkcom, 660 F.2d 573, 582-83 (5th Cir. Unit B 1981), cert. denied, 459 U.S. 882, 103 S.Ct. 181, 74 L.Ed.2d 148 (1982); Spinkellink, v. Wainwright, 578 F.2d 582, 593-99 (5th Cir. 1978), cert. denied, 440 U.S. 976, 99 S.Ct. 1548, 59 L.Ed.2d 796, reh'g denied, 441 U.S. 937, 99 S.Ct. 2064, 60 L.Ed.2d 667 (1979). The Court in Spinkellink also rejected petitioner's claims that the exclusion of death-scrupled jurors resulted in a prosecutionprone jury or a jury that was incapable of maintaining "a link between contemporary community values and the penal system." 578 F.2d at 593-99. See generally, Woodson v. North Carolina, 428 U.S. 280, 295, 96 S.Ct. 2978. 2987, 49 L.Ed.2d 944 (1976).

Because the two prospective jurors indicated they would not consider the death penalty under any circumstances, they were properly excluded, and petitioner's Claim "O" is without merit.

## XIII. CLAIM "I"—PETITIONER'S CLAIM THAT THE DEATH PENALTY FAILS TO SERVE RATIONAL INTERESTS.

In his petition for the writ petitioner raised a claim that the death penalty fails to serve rational interests. Neither petitioner nor the State has briefed this issue, but the premise appears to be that the supposed deterrent value of the death penalty cannot be demonstrated; that executions set socially-sanctioned examples of violence; that public sentiment for retribution is not so strong as to justify use of the death penalty; and that no penal

purpose is served by execution which cannot be more effectively served by life imprisonment. Such arguments are more properly addressed to the political bodies. See Furman v. Georgia, 408 U.S. 238, 410, 92 S.Ct. 2726, 2814, 33 L.Ed.2d 346 (1972) (Blackmun, J., dissenting). Georgia's death penalty was declared constitutional in Gregg v. Georgia, 428 U.S. 153, 183, 96 S.Ct. 2909, 2929, 49 L.Ed.2d 859 (1976). Petitioner's Claim "I" is therefore without merit.

# XIV. CLAIM "Q"—PETITIONER'S BRADY CLAIM.

Petitioner contends that prior to trial defense counsel filed a *Brady* motion seeking, *inter alia*, statements he was alleged to have been made and that the State failed to produce the statement that was alleged to have been made to Offie Evans while in the Fulton County Jail. Petitioner contends that this failure to produce the statement prior to trial entitles him to a new trial.

Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) requires the prosecution to produce any evidence in its possession which would tend to be favorable or exculpatory to the defendant. However, Brady does not establish any right to pretrial discovery in a criminal case, but instead seeks only to insure the fairness of a defendant's trial and the reliability of the jury's determinations. United States v. Beasley, 576 F.2d 626 (5th Cir.1978), cert. denied, 440 U.S. 947, 99 S.Ct. 1426, 59 L.Ed.2d 636 (1979). Thus, a defendant who seeks a new trial under Brady must meet three requirements to establish a successful claim: "(1) The prosecutor's suppression of the evidence, (2) the favorable character of the suppressed evidence for the defense, and (3) the materiality of the suppressed evidence." Martinez v. Wainwright, 621 F.2d 184 (5th Cir.1980); United States v. Preston, 608 F.2d 626, 637 (5th Cir. 1979), cert. denied, 446 U.S. 940, 100 S.Ct. 2162, 64 L.Ed.2d 794 (1980); United States v. Delk, 586 F.2d 513, 518 (5th Cir.1978).

As a preliminary matter the court notes that the testimony of Offie Evans was hardly favorable to petitioner. Most of the testimony was highly damaging to petitioner. The only part of the testimony which could even remotely be regarded as favorable was Evans' testimony that McCleskey had told him that his face had been made up on the morning of the robbery by Mary Jenkins. This testimony contradicted Mary Jenkins' earlier testimony and thus had impeachment value against one of the State's witnesses. However, the very testimony that would have been impeached was testimony favorable to petitioner. Jenkins' testimony that petitioner had clear skin and no scar on the day of the crime contradicted the testimony of the store employees that the person in the front of the store had a rough, pimply complexion and a scar. Thus, Jenkins' testimony regarding petitioner's complexion on the morning of the crime helped create doubt in his favor. Impeachment of that testimony would have hurt rather than helped petitioner.

As a secondary matter, the court cannot see that the evidence in question was suppressed by the prosecution. While it was not produced prior to trial, it was produced during the trial. Thus, the jury was able to consider it in its deliberations. Petitioner has produced no cases to support the proposition that the failure of the prosecution to produce evidence prior to trial entitles him to a new trial where that evidence was produced during the trial. Since the evidence was before the jury, the court cannot find that the failure to disclose it prior to trial deprived petitioner of due process. Petitioner's Claim "Q" is clearly without merit.

# XV. CLAIM "R"—SUFFICIENCY OF THE EVIDENCE

By this claim petitioner contends that the evidence introduced at trial was insufficient to prove beyond a reasonable doubt that he was the triggerman who shot Officer Schlatt and that the shooting constituted malice murder. Petitioner does not argue that the evidence was insufficient to support his conviction for armed robbery.

As part of its review in this case, the Supreme Court found that "the evidence factually substantiates and supports the finding of the aggravating circumstances, the finding of guilt, and the sentence of death by a rational trier of fact beyond a reasonable doubt." Mc-Cleskey v. State, 245 Ga. 108, 115, 263 S.E.2d 146 (1980). In reviewing the sufficiency of the evidence, this court must view the evidence in a light most favorable to the State and should sustain the jury's verdict unless it finds that no rational trier of fact could find the defendant guilty beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

Much of the evidence against petitioner was circumstantial. Witnesses placed him in the front of the store carrying a nickel-plated revolver matching the description of a .38 caliber Rossi which petitioner had stolen in an earlier armed robbery. The State's ballistics expert testified that the bullet which killed Officer Schlatt was probably fired from a .38 caliber Rossi. At least one witness testified that the shots were fired from a point closer to the front of the store than she was lying.

While the circumstantial evidence alone may not have been sufficient to support a verdict of malice murder, the State also introduced highly damaging testimony by one of the co-defendants, Ben Wright, and a fellow inmate at the Fulton County Jail, Offie Evans. Both of these witnesses testified that petitioner had admitted shooting Officer Schlatt. Evans testified that McCleskey told him that he would have shot his way out of the store even if there had been a dozen police officers. It is not this court's function to weigh the credibility of this testimony. That was for the jury to do. Viewing all the evidence in a light most favorable to the State, this court cannot find that no rational trier of fact could find petitioner guilty beyond a reasonable doubt of malice murder. Jackson v.

Virginia, supra. Petitioner's Claim "R" is therefore without merit.

# XVI. CLAIM "P"—INEFFECTIVE ASSISTANCE OF COUNSEL.

By this claim petitioner contends that he was denied effective assistance of counsel in contravention of the Sixth and Fourteenth Amendments. He alleges that his counsel was ineffective for the following reasons: (1) That his attorney failed to investigate adequately the State's evidence and possible defenses prior to trial; (2) that during the trial counsel failed to raise certain objections or make certain motions; (3) that prior to the sentencing phase of petitioner's trial counsel failed to undertake an independent investigation into possible mitigating evidence and thus was unable to offer any mitigating evidence to the jury; and (4) that after the trial, counsel failed to review and correct the judge's sentence report.

It is well established in this circuit that a criminal defendant is entitled to effective assistance of counsel-that is, "counsel reasonably likely to render and rendering reasonably effective assistance." See, e.g., Washington v. Strickland, 693 F.2d 1243, 1250 (5th Cir. Unit B, 1982) (en banc), cert. granted, — U.S. —, 103 S.Ct. 2451, 77 L.Ed.2d 1332 (1983); Gaines v. Hopper, 575 F.2d 1147, 1149 (5th Cir. 1978); Herring v. Estelle, 491 F.2d 125, 127 (5th Cir.1974); MacKenna v. Ellis, 280 F.2d 592, 599 (5th Cir.1960), cert. denied, 368 U.S. 877, 82 S.Ct. 121, 7 L.Ed.2d 78 (1961). However, the Constitution does not guarantee errorless counsel or counsel judged ineffective only by hindsight. Herring v. Estelle, supra. In order to be entitled to habeas corpus relief on a claim of ineffective assistance of counsel, petitioner must establish by a preponderance of the evidence: (1) That based upon the totality of circumstances in the entire record his counsel was not "reasonably likely to render" and in fact did not render "reasonably effective assistance," and (2) that "ineffectiveness of counsel resulted in actual and substantial disadvantage to the course of his defense." Washington v. Strickland, 693 F.2d 1243, 1262 (5th Cir. Unit B 1982) (en banc). Even if petitioner meets this burden, habeas corpus relief may still be denied if the State can prove that "in the context of all the evidence... it remains certain beyond a reasonable doubt that the outcome of the proceedings would not have been altered but for the ineffectiveness of counsel." Id. With these standards in mind the court now addresses petitioner's particular contentions.

## A. Pretrial Investigation.

It is beyond dispute that effective assistance of counsel requires some degree of pretrial investigation. "Informed evaluation of potential defenses to criminal charges and meaningful discussion with one's client of the realities of his case are cornerstones of effective assistance of counsel." Gaines v. Hopper, 575 F.2d 1147, 1149-50 (5th Cir. 1978). In Washington v. Strickland, 693 F.2d 1243 (5th Cir. Unit B 1982) (en banc), the court discussed the extent of pretrial investigation required to constitute effective assistance of counsel. In that case the court stated:

The amount of pretrial investigation that is reasonable defies precise measurement. It will necessarily depend upon a variety of factors including the number of issues in the case, relative complexity of those issues, the strength of the government's case, and the overall strategy of trial counsel. . . . In making that determination, courts should not judge the reasonableness of counsel's efforts from the omniscient perspective of hindsight, but rather "from the perspective of counsel, taking into account all of the circumstances of the case, but only as those circumstances were known to him at the time in question." *Id.* at 1251 (quoting *Washington v. Watkins*, 655 F.2d 1346 at 1356 [5th Cir. Unit A 1981]).

The court went on to analyze a variety of cases falling into five general categories.<sup>34</sup> The category of cases identified by the *Washington* court which most closely resembles the present case was the one in which "counsel fails to conduct a substantial investigation into one plausible line of defense because of his reasonable strategic choice to rely upon another plausible line of defense at trial." In analyzing these cases the court stated:

As observed above, when effective counsel would discern several plausible lines of defense he should ideally perform a substantial investigation into each line before making a strategic decision as to which lines he will employ at trial. In this ideal, as expressed in the American Bar Association's Standards, is an aspiration to which all defense counsel should strive. It does not, however, respect the constitutional minimum for reasonably effective assistance of counsel. . . . Realistically, given the finite resources of time and money that are available to defense counsel, fewer than all plausible lines of defense will be the subject of substantial investigation. Often counsel will make a choice of trial strategy early in the representation process after conferring with his client, reviewing the State's evidence, and bringing to bear his experience and pro-

<sup>34</sup> The five categories of cases dealing with claims of ineffective assistance of counsel in the pretrial investigations were: (1) counsel fails to conduct substantial investigation into the one plausible line of defense in the case; (2) counsel conducts a reasonably substantial investigation into the one line of defense that is presented at trial; (3) counsel conducts a reasonably substantial investigation into all plausible lines of defense and chooses to rely upon fewer than all of them at trial; (4) counsel fails to conduct a substantial investigation into one plausible line of defense because of his reasonable strategic choice to rely upon another plausible line of defense at trial; and (5) counsel fails to conduct a substantial investigation into plausible lines of defense for reasons other than strategic choice.

fessional judgment. Thereafter, he will constitute his finite resources on investigating those lines of defense upon which he has chosen to rely.

The choice by counsel to rely upon certain lines of defense to the exclusion of others before investigating all such lines is a strategic choice. . . . .

A strategy chosen without the benefit of a reasonably substantial investigation into all plausible lines of defense is generally based upon counsel's professional assumptions regarding the prospects for success offered by the various lines. The cases generally conform to a workable and sensible rule: When counsel's assumptions are reasonable, given the totality of the circumstances and when counsel's strategy represents a reasonable choice based upon those assumptions, counsel need not investigate lines of defense that he has chosen not to employ at trial. 693 F.2d at 1254-55.

In the present case petitioner's trial counsel was faced with two plausible lines of defense—an alibi defense or a defense that petitioner participated in the robbery but was not the triggerman who killed Officer Schlatt. Pursuing the second defense would almost have guaranteed a conviction for armed robbery and felony murder, for which petitioner could still have received the death penalty or at least life imprisonment.<sup>35</sup> On the other hand, a successful alibi defense offered the prospect of no punishment at all. Trial counsel testified at the state habeas corpus hearing that McCleskey had re-

<sup>&</sup>lt;sup>35</sup> Under Georgia law applicable at the time of petitioner's trial, petitioner, as a party to the crime of armed robbery, would have been subject to the same penalty for the death of Officer Schlatt irrespective of whether he actually pulled the trigger. See Ga.Code Ann. § 26-801 (now codified at O.C.G.A. § 16-2-21). Under Georgia law at the time both murder and felony murder were punishable by death or life imprisonment. Ga.Code Ann. § 26-1101 (now codified at O.C.G.A. § 16-5-1).

peatedly insisted that he was not present at the crime. Trial counsel also testified that after the preliminary hearing he and McCleskey reasonably believed that an alibi defense could be successful. A primary reason for this belief was that Mamie Thomas, one of the Dixie Furniture Mart employees who was up front when the robber came in and had an opportunity to observe him, was unable to identify McCleskey at the preliminary hearing, despite the fact that she was standing only a few feet from him. Given the contradictory descriptions given by the witnesses at the store, the inability of Mamie Thomas to identify petitioner, and petitioner's repeated statements that he was not present at the scene. and the possible outcome of pursuing the only other defense available, the court cannot say that trial counsel's decision to pursue the alibi defense was unreasonable or constituted ineffective assistance of counsel.

Having made a reasonable strategic choice to pursue an alibi defense, trial counsel could reasonably have decided not to interview all of the store employees. None of the statements produced by petitioner indicates that these employees would have contradicted the State's theory of the case. At best, they might have cumulatively created a reasonable doubt as to whether petitioner was the triggerman. This, however, was a defense counsel and petitioner had chosen not to pursue. Counsel had read their statements and concluded that none of these employees could identify McCleskey as the gunman who entered the front of the store. He also had the sworn testimony of at least one witness that McCleskey was definitey not the person who entered the front of the store. Under such circumstances the failure to interview the store employees was reasonable. See Washington v. Watkins, 655 F.2d 1346 (5th Cir. Unit A 1981), cert. denied, 456 U.S. 949, 102 S.Ct. 2021, 72 L.Ed.2d 474 (1982) (failure to interview in person the only eye witness to an armed robbery and murder not ineffective assistance of counsel where client was asserting an ailbi defense and telephone interview had established that witness could not identify or describe the gunman).36

Slightly more troubling than the failure to interview the witnesses at the store was counsel's failure to interview the sheriff's deputies and Offie Evans prior to trial. Evans' testimony was certainly very damaging to petitioner, and a pretrial investigation as to what his testimony would be may have uncovered the details of his escape from a halfway house and the pending federal charges against him, his "understanding" with an Atlanta police detective, his history of drug use, and his imaginative story that he had gone to Florida and participated in an undercover drug investigation during his escape. Discovery of such evidence would have had substantial impeachment value. However, this court cannot find on the facts before it that counsel acted unreasonably in failing to interview Evans prior to trial. Although he recognized that at least one of the names in the prosecution's witness list was a Fulton County Sheriff's Deputy and suspected that a jailhouse confession might be forthcoming, counsel testified that McCleskey told him that he had made absolutely no incriminating statements to anyone in the Fulton County Jail. There has been no allegation that petitioner was incompetent or insane at any time during this proceeding. It would be anomalous, then, for this court to grant petitioner habeas corpus relief on the grounds that petitioner's counsel was ineffective because he did not disbelieve and undertake an independent investigation.

<sup>36</sup> Although Mamie Thomas recanted her testimony immediately after the preliminary hearing, telling one of the detectives that she had lied because she was scared, and a later interview with her may have disclosed the change of testimony, this court cannot hold as a matter of law that counsel has a duty to disbelieve sworn testimony of a witness favorable to his client. In other words, counsel could reasonably believe that the witness's testimony at trial would be substantially the same as it was at the preliminary hearing. When it turned out to be different, counsel took the proper step of impeaching her later testimony with her testimony at the preliminary hearing.

Finally, petitioner contends that his counsel was ineffective because he failed to interview State's ballistics expert, Kelly Fite. However, a similar claim was rejected on similar facts in Washington v. Watkins, 655 F.2d at 1358. Petitioner's counsel had read the expert's report and was prepared adequately to cross-examine the expert at trial. The court does not believe, therefore, that the failure to interview the witness in person prior to trial constituted ineffective assistance of counsel.

# B. Performance During the Trial: Guilt/Innocence Phase.

Petitioner also contends that counsel's conduct of the trial was deficient in several respects. First, petitioner contends that the failure to move for a continuance or a mistrial when he learned of the suggestive line-up procedure on the morning of the trial constituted ineffective assistance. However, the court has already concluded in Part X, supra, that there was nothing unconstitutional about the chance viewing of the defendants prior to trial. The viewing therefore would not have been grounds for a mistrial or a continuance. Failure to make a motion unwarranted in law is not ineffective assistance of counsel.

Petitioner also contends that this counsel failed to object to admission of evidence regarding prior convictions and sentences for armed robbery. Petitioner makes the somewhat technical argument that because these convictions had been set aside by the granting of a motion for a new trial that they were inadmissible. Petitioner further contends that counsel did not object to this evidence because he had failed to investigate the circumstances of these convictions prior to trial.<sup>37</sup> As-

<sup>&</sup>lt;sup>37</sup> Pursuant to Ga.Code Ann. § 27-2503(a) the State informed trial counsel on October 2, 1978 that it intended to offer in aggravation certain prior convictions and sentences of petitioner. The convictions and sentences which petitioner contends were invalid were among those listed.

suming for the moment that the failure to investigate these convictions constituted ineffective assistance of counsel, the court is unconvinced that petitioner can show actual and substantial prejudice resulted from the ineffectiveness. See Washington v. Strickland, 693 F.2d 1243, 1262 (5th Cir. Unit B) 1982) (en banc) cert. granted, — U.S. —, 103 S.Ct. 2451, 77 L.Ed.2d 1332 (1983). First, petitioner does not contend that he was not guilty of those crimes. In fact, after being granted a new trial he pleaded guilty to them and received an 18-year sentence. The court has already held that under Georgia law those crimes were admissible to show that petitioner engaged in a pattern or practice of armed robberies. The court cannot say that counsel's failure to object to the introduction of this evidence at the guilt stage caused petitioner actual and substantial prejudice. Also, whole the jury did learn that petitioner had received life sentences which had subsequently been set aside and this fact may have prejudiced them at the penalty stage of petitioner's trial,38 the court is unprepared to say that in the context of all of the evidence, the failure of counsel to object to the introduction of this evidence warrants petitioner a new trial. However, given the court's holding in Part III, supra, this point is essentially moot.

Finally, petitioner contends that trial counsel was ineffective because he failed to object to the trial court's "overly broad instructions to the jury (1) with regard to presumptions of intent and (2) as to the use of 'other acts' evidence for proof of intent, and (3) as aggravating circumstances at the sentencing phase." Petitioner's September 20, 1983 Memorandum of Law in Support of Issuance of the Writ at 64. This court has already found that the trial court's instructions were not erroneous or overbroad. See Parts IV, VII and VIII, supra. Failure to object to the instructions was not, therefore, ineffective assistance of counsel.

<sup>38</sup> See note 26, supra.

# C. Ineffective Assistance at Trial-Sentencing Phase.

Petitioner has contended that trial counsel was ineffective because he failed to undertake an independent investigation to discover and produce mitigating evidence and witnesses to testify on behalf of petitioner at the sentencing phase of his trial. Trial counsel testified that he asked petitioner for names of persons who would be willing to testify for him and that petitioner was unable to produce a single name. Counsel also testified that he contacted petitioner's sister and that she also was unable to produce any names.39 A review of trial counsel's testimony at the state habeas hearing convinces this court that counsel made a reasonable effort to uncover mitigating evidence but could find none. Petitioner's sister declined to testify on her brother's behalf and told counsel that petitioner's mother was unable to testify because of illness. McCleskey v. Zant, H.C. No. 4909, Slip Op. at 19 (Sup.Ct. of Butts County, April 8, 1981). The record simply does not support a finding of actual and substantial prejudice to petitioner due to any ineffective assistance by petitioner's counsel at the sentencing phase of the trial.

# D. Ineffective Assistance—Post-Trial.

Petitioner contends that trial counsel was also ineffective in failing to correct inaccuracies and omissions in the trial judge's post-trial sentencing report.<sup>40</sup>

<sup>&</sup>lt;sup>39</sup> The sister testified at the state habeas hearing that counsel never asked her for any names and that if he had done so she would have been ready, willing and able to produce a number of names. The habeas court specifically chose to credit the testimony of the trial counsel rather than the sister. See McCleskey v. Zant, H.C. No. 4909, Slip Op. at 19 (Sup.Ct. of Butts County, April 8, 1981). This finding of fact is presumed to be correct. 28 U.S.C. § 2254(d).

<sup>&</sup>lt;sup>40</sup> Georgia's capital sentencing procedure provides for the filing of a trial judge's report to be part of the record reviewed by the Georgia Supreme Court on appeal. O.C.G.A. § 17-10-35.

This report is used by the Georgia Supreme Court as part of its review of whether the sentence imposed was arbitrary, excessive, or disproportionate.41 While it was in part because the Georgia capital sentencing procedure provided such a review that the Supreme Court upheld the Georgia death penalty in Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976), the Supreme Court has recently declared that such proportionality reviews are not required by the Constitution. Pulley v. Harris, — U.S. — at — - -, 104 S.Ct. 871 at 876-881, 79 L.Ed.2d 29 (1984). Since proportionality reviews are not required by the Constitution, it is difficult for this court to see actual and substantial prejudice caused to petitioner by counsel's failure to review and correct mistakes in the trial judge's report, even if such failure would constitute ineffective assistance of counsel.

Since the court has concluded that petitioner has been unable to show actual and substantial prejudice caused by any ineffective assistance of counsel, petitioner's Claim "P" is without merit.

## XVII. CONCLUSION

For the reasons set forth in Part III, supra, it is OR-DERED, ADJUDGED, and DECREED that petitioner's conviction for malice murder be set aside and that petitioner within one hundred twenty (120) days after this judgment becomes final as a result of the failure of respondent to lodge an appeal or as the result of the issuance of a mandate affirming this decision, whichever is later, be reindicted and tried, failing which this writ of habeas corpus without further order shall be made absolute.

<sup>&</sup>lt;sup>41</sup> For a discussion of proportionality analysis in Eighth Amendment jurisprudence see Comment "Down the Road Toward Human Decency": Eighth Amendment Proportionality Analysis and Solem vs. Helm, 18 Ga.L.Rev. 109 (1983).

TABLE 1
RACE OF THE VICTIM

				-				-							
	DB61	<b>DB70</b>	DB73	<b>DB74</b>	<b>DB77</b>	DB80	<b>DB78</b>	DB83	DB83	<b>DB83</b>	DB79A	DB83	<b>DB80</b>	DB85	DB102
*	Unadjusted	1	1	1	2	9	10	13	14	44	83	136	230	230	250
Incremental Increase in															
Death Sentencing Rate	10 pts.	.17 pt.	.09	.17	.09	.07	.07	.06	.06	.07	.10	.07	.06	.06	.04
"P" Value		.0001	.0001	.001	.0001	.001	.0014	.001	.001	.0002	.001	.01	.01	.021	.04
,		RACE OF THE DEFENDANT													
	DB61	DB70	DB73	<b>DB74</b>	<b>DB77</b>	<b>DB80</b>	<b>DB78</b>	<b>DB83</b>	<b>DB83</b>	<b>DB83</b>	DB79A	<b>DB83</b>	<b>DB80</b>	<b>DB85</b>	DB102
Incremental Increase in															
Death Sentencing Rate	-0.3	.10	.05	.10	.05	.04	.04	.05	.06	.06	.07	.06	.06	.06	.04
"P" Value		.0001	.031	.01	.03	.10	.09	.01	.001	.0004	.01	.01	.01	.02	.05



## UNITED STATES COURT OF APPEALS ELEVENTH CIRCUIT

#### No. 84-8176

WARREN MCCLESKEY, PETITIONER-APPELLEE, CROSS-APPELLANT

v.

RALPH KEMP, Warden, RESPONDENT-APPELLANT, CROSS-APPELLEE

Jan. 29, 1985

#### OPINION OF THE COURT

Before GODBOLD, Chief Judge, RONEY, TJOFLAT, JAMES C. HILL, FAY, VANCE, KRAVITCH, JOHNSON, ALBERT J. HENDERSON, HATCHETT, R. LANIER ANDERSON, III, and CLARK, Circuit Judges.

RONEY, Circuit Judge, with whom Judges, TJOFLAT, JAMES C. HILL, FAY, VANCE, ALBERT J. HENDERSON and R. LANIER ANDERSON, III, join \*:

<sup>\*</sup> All of the Judges of the Court concur in the judgment as to the death-oriented jury claim and the ineffective assistance of counsel claim. Judges Tjoflat, Vance and Anderson join in the opinion but each has written separately on the constitutional application of the Georgia death sentence.

Judge Kravitch has written separately to concur only in the harmless error portion of the opinion on the Giglio issue but joins in the opinion on all other issues.

Chief Judge Godbold dissents from the judgment of the Court on the Giglio issue but joins in the opinion on all other issues.

Judges Johnson, Hatchett and Clark dissent from the judgment of the Court on the constitutional application of the Georgia death sentence and the *Sandstrom* and *Giglio* issues and each has written a separate dissenting opinion.

This case was taken en banc principally to consider the argument arising in numerous capital cases that statistical proof shows the Georgia capital sentencing law is being administered in an unconstitutionally discriminatory and arbitrary and capricious matter. After a lengthy evidentiary hearing which focused on a study by Professor David C. Baldus, the district court concluded for a variety of reasons that the statistical evidence was insufficient to support the claim of unconstitutionality in the death sentencing process in Georgia. We affirm the

district court's judgment on this point.

The en banc court has considered all the other claims involved on this appeal. On the State's appeal, we reverse the district court's grant of habeas corpus relief on the claim that the prosecutor failed to disclose a promise of favorable treatment to a state witness in violation of Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1982). We affirm the judgment denying relief on all other points raised by the defendant, that is: (1) that defendant received ineffective assistance of counsel; (2) that jury instructions contravened the due process clause in violation of Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed. 2d 39 (1979); and (3) that the exclusion of deathscrupled jurors violated the right to an impartial and unbiased jury drawn from a representative cross-section of the community.

Thus, concluding that the district court should have denied the petition for writ of habeas corpus, we affirm on all claims denied by the court, but reverse the grant

of habeas corpus relief on the Giglio claims.

# **FACTS**

Warren McCleskey was arrested and charged with the murder of a police officer during an armed robbery of the Dixie Furniture Store. The store was robbed by a band of four men. Three entered through the back door and one through the front. While the men in the rear of the store searched for cash, the man who entered through the front door secured the showroom by forcing everyone there to lie face down on the floor. Responding to a silent alarm, a police officer entered the store by the front door. Two shots were fired. One shot struck the police officer in the head causing his death. The other glanced off a cigarette lighter in his chest pocket.

McCleskey was identified by two of the store personnel as the robber who came in the front door. Shortly after his arrest, McCleskey confessed to participating in the robbery but maintained that he was not the triggerman. McCleskey confirmed the eyewitness' accounts that it was he who entered through the front door. One of his accomplices, Ben Wright, testified that McCleskey admitted to shooting the officer. A jail inmate housed near McCleskey testified that McCleskey made a "jail house confession" in which he claimed he was the triggerman. The police officer was killed by a bullet fired from a .38 caliber Rossi handgun. McCleskey had stolen a .38 caliber Rossi in a previous holdup.

## PRIOR PROCEEDINGS

The jury convicted McCleskey of murder and two counts of armed robbery. At the penalty hearing, neither side called any witnesses. The State introduced documentary evidence of McCleskey's three prior convictions for armed robbery.

The jury sentenced McCleskey to death for the murder of the police officer and to consecutive life sentences for the two counts of armed robbery. These convictions and sentences were affirmed by the Georgia Supreme Court. McClesky v. State, 245 Ga. 108, 263 S.E.2d 146, cert. denied, 449 U.S. 891, 101 S.Ct. 253, 66 L.Ed.2d 119 (1980). McCleskey then petitioned for habeas corpus relief in state court. This petition was denied after an evidentiary hearing. The Georgia Supreme Court denied McCleskey's application for a certificate of probable cause to appeal. The United States Supreme Court decause to appeal. The United States Supreme Court decause

nied a petition for a writ of certiorari. McCleskey v. Zant, 454 U.S. 1093, 102 S.Ct. 659, 70 L.Ed.2d 631 (1981).

McCleskey then filed his petition for habeas corpus relief in federal district court asserting, among other things, the five constitutional challenges at issue on this appeal. After an evidentiary hearing and consideration of extensive memoranda filed by the parties, the district court entered the lengthy and detailed judgment from which these appeals are taken. McCleskey v. Zant, 580 F.Supp. 338 (N.D.Ga.1984).

This opinion addresses each issue asserted on appeal in the following order: (1) the Giglio claim, (2) constitutionality of the application of Georgia's death penalty, (3) effective assistance of counsel, (4) death-quali-

fication of jurors, and (5) the Sandstrom issue.

### GIGLIO CLAIM

The district court granted habeas corpus relief to McCleskey because it determined that the state prosecutor failed to reveal that one of its witnesses had been promised favorable treatment as a reward for his testimony. The State violates due process when it obtains a conviction through the use of false evidence or on the basis of a witness's testimony when that witness has failed to disclose a promise of favorable treatment from the prosecution. Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972).

We hold that (1) there was no promise in this case, as contemplated by *Giglio*; and (2) in any event, had there been a *Giglio* violation, it would be harmless. Thus, we reverse the grant of habeas corpus relief on this ground.

Offie Gene Evans, a prisoner incarcerated with Mc-Cleskey, was called by the State on rebuttal to strengthen its proof that McCleskey was the triggerman at the holdup. Evans testified that McCleskey admitted to him in jail that he shot the policeman and that McCleskey said he had worn makeup to disguise his appearance during the robbery.

### The "Promise"

At McCleskey's state habeas corpus, hearing, Evans gave the following account of certain conversations with state officials.

THE COURT: Mr. Evans, let me ask you a question. At the time that you testified in Mr. Mc-Clesky's trial, had you been promised anything in exchange for your testimony?

THE WITNESS: No, I wasn't. I wasn't promised nothing about—I wasn't promised nothing by the D.A. but the Detective told me that he would—he said he was going to do it himself, speak a word for me. That was what the Detective told me.

Q: (by McCleskey's attorney): The Detective said he would speak a word for you?

A: Yeah.

A deposition of McCleskey's prosecutor that was taken for the state habeas corpus proceeding reveals that the prosecutor contacted federal authorities after McCleskey's trial to advise them of Evans' cooperation and that the escape charges were dropped.

# The Trial Testimony

At the trial, the State brought out on direct examination that Evans was incarcerated on the charge of escape from a federal halfway house. Evans denied receiving any promises from the prosecutor and downplayed the seriousness of the escape charge.

- Q: [by prosecutor]: Mr. Evans, have I promised you anything for testifying today?
  - A: No, sir, you ain't.
- Q: You do have an escape charge still pending, is that correct?
- A: Yes, sir. I've got one, but really it ain't no escape, what the peoples out there tell me, because

I stayed at home and when I called the man and told him that I would be a little late coming in, he placed me on escape charge and told me there wasn't no use of me coming back, and I just stayed on at home and he come and picked me up.

Q: Are you hoping that perhaps you won't be

prosecuted for escape?

A: Yeah, I hope I don't, but I don't—what they tell me, they ain't going to charge me with escape no way.

Q: Have you asked me to try to fix it so you wouldn't get charged with escape?

A: No, sir.

Q. Have I told you I would try to fix it for you?

A: No, sir.

# The State Habeas Corpus Decision

The state court rejected McCleskey's Giglio claim on the following reasoning:

Mr. Evans at the habeas hearing denied that he was promised anything for his testimony. He did state that he was told by Detective Dorsey that Dorsey would 'speak a word' for him. The detective's exparte communication recommendation alone is not sufficient to trigger the applicability of Giglio v. United States, 405 U.S. 150 [92 S.Ct. 763, 31 L.Ed. 2d 104] (1972).

The prosecutor at petitioner's trial, Russell J. Parker, stated that he was unaware of any understandings between Evans and any Atlanta Police Department detectives regarding a favorable recommendation to be made on Evans' federal escape charge. Mr. Parker admitted that there was opportunity for Atlanta detectives to put in a good word for Evans with federal authorities. However, he further stated that when any police officer has been killed and someone

ends up testifying for the State, putting his life in danger, it is not surprising that charges, like those against Evans, will be dropped.

In the absence of any other evidence, the Court cannot conclude an agreement existed merely because of subsequent disposition of criminal charges against a witness for the State.

Although it is reasonable to conclude that the state court found that there was no agreement between Evans and the prosecutor, no specific finding was made as to Evans' claim that a detective promised to "speak a word for him." The court merely held as a matter of law that assuming Evans was telling the truth, no Giglio violation had occurred.

#### Was It a Promise?

The Supreme Court's rationale for imposing this rule is that "[t]he jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence." Napue v. Illinois, 360 U.S. 264, 269, 79 S.Ct. 1173, 1177, 3 L.Ed.2d 1217 (1959). The Court has never provided definitive guidance on when the Government's dealings with a prospective witness so affect the witness' credibility that they must be disclosed at trial. In Giglio, a prosecutor promised the defendant's alleged co-conspirator that no charges would be brought against him if he testified against the defendant. In Napue, a prosecutor promised a witness that in exchange for his testimony the prosecutor would recommend that the sentence the witness was presently serving be reduced.

In this case, the detective's promise to speak a word falls far short of the understandings reached in Giglio and Napue. As stated by this Court, "[t]he thrust of Giglio and its progeny has been to ensure that the jury know the facts that might motivate a witness in giving testimony." Smith v. Kemp, 715 F.2d 1459, 1467 (11th Cir.), cert. denied, — U.S. —, 104 S.Ct. 510, 78

L.Ed.2d 699 (1983). The detective's statement offered such a marginal benefit, as indicated by Evans, that it is doubtful it would motivate a reluctant witness, or that disclosure of the statement would have had any effect on his credibility. The State's nondisclosure therefore failed to infringe McCleskey's due process rights.

# Was Any Violation Harmless?

In any event, there is no "reasonable likelihood" that the State's failure to disclose the detective's cryptic statement or Evans' different escape scenario affected the judgment of the jury. See Giglio, 405 U.S. at 154, 92 S.Ct. at 766. Evans' credibility was exposed to substantial impeachment even without the detective's statement and the inconsistent description of his escape. The prosecutor began his direct examination by having Evans recite a litany of past convictions for forgery, two burglaries, larceny, carrying a concealed weapon, and theft from the United States mail. On cross examination, McCleskey's attorney attempted to portray Evans as a "professional criminal". Evans also admitted that he was testifying to protect himself and one of McCleskey's codefendants. In light of this substantial impeachment evidence, we find it unlikely that the undisclosed information would have affected the jury's assessment of Evans' credibility. See United States v. Anderson, 574 F.2d 1347, 1356 (5th Cir.1978).

McCleskey claims Evans' testimony was crucial because the only other testimony which indicated he pulled the trigger came from his codefendant, Ben Wright. Ben Wright's testimony, McCleskey urges, would have been insufficient under Georgia law to convict him without the corroboration provided by Evans. In Georgia, an accomplice's testimony alone in felony cases is insufficient to establish a fact. O.C.G.A. § 24-4-8. Wright's testimony, however, was corroborated by McCleskey's own confession in which McCleskey admitted participation in the robbery. See Arnold v. State, 236 Ga. 534, 224 S.E.2d 386, 388

(1976). Corroboration need not extend to every material detail. *Blalock v. State*, 250 Ga. 441, 298 S.E.2d 477, 479-80 (1983); *Cofer v. State*, 166 Ga.App. 436, 304 S.E.2d 537, 539 (1983).

The district court thought Evans' testimony critical because of the information he supplied about makeup and McCleskey's intent in shooting the police officer. Although we agree that his testimony added weight to the prosecution's case, we do not find that it could "in any reasonable likelihood have affected the judgment of the jury." Giglio, 405 U.S. at 154, 92 S.Ct. at 766 (quoting Napue v. Illinois, 360 U.S. at 271, 79 S.Ct. at 1178). Evans, who was called only in rebuttal, testified that McCleskey had told him that he knew he had to shoot his way out, and that even if there had been twelve policemen he would have done the same thing. This statement, the prosecutor argued, showed malice. In his closing argument, however, the prosecutor presented to the jury three reasons supporting a conviction for malice murder. First, he argued that the physical evidence showed malicious intent because it indicated that McCleskey shot the police officer once in the head and a second time in the chest as he lay dying on the floor. Second, the prosecutor asserted that McCleskey had a choice, either to surrender or to kill the officer. That he chose to kill indicated malice. Third, the prosecutor contended that McCleskey's statement to Evans that he still would have shot his way out if there had been twelve police officers showed malice. This statement by McCleskey was not developed at length during Evans' testimony and was mentioned only in passing by the prosecutor in closing argument.

Evans' testimony that McCleskey had made up his face corroborated the identification testimony of one of the eyewitnesses. Nevertheless, this evidence was not crucial to the State's case. That McCleskey was wearing makeup helps to establish he was the robber who entered the furniture store through the front door. This fact had already been directly testified to by McCleskey's accomplice and

two eyewitnesses as well as correborated by McCleskey's own confession. That Evans' testimony buttresses one of the eyewitnesses' identifications is relatively unimportant.

Thus, although Evans' testimony might well be regarded as important in certain respects, the corroboration of that testimony was such that the revelation of the Giglio promise would not reasonably affect the jury's assessment of his credibility and therefore would have had no effect on the jury's decision. The district court's grant of habeas corpus relief on this issue must be reversed.

# CONSTITUTIONAL APPLICATION OF GEORGIA'S DEATH PENALTY

In challenging the constitutionality of the application of Georgia's capital statute, McCleskey alleged two related grounds for relief: (1) that the "death penalty is administered arbitrarily, capriciously, and whimsically in the State of Georgia," and (2) it "is imposed . . . pursuant to a pattern and practice . . . to discriminate on the grounds of race," both in violation of the Eighth and Fourteenth Amendments of the Constitution.

The district court granted petitioner's motion for an evidentiary hearing on his claim of system-wide racial discrimination under the Equal Protection Clause of the Fourteenth Amendment. The court noted that "it appears . . . that petitioner's Eighth Amendment argument has been rejected by this Circuit in Spinkellink v. Wainwright, 578 F.2d 582, 612-14 (5th Cir.1978) . . . [but] petitioner's Fourteenth Amendment claim may be appropriate for consideration in the context of statistical evidence which the petitioner proposes to present." Order of October 8, 1982, at 4.

An evidentiary hearing was held in August, 1983. Petitioner's case in chief was presented through the testimony of two expert witnesses, Professor David C. Baldus and Dr. George Woodworth, as well as two principal lay witnesses, Edward Gates and L.G. Warr, an official em-

ployed by Georgia Board of Pardons and Paroles. The state offered the testimony of two expert witnesses, Dr. Joseph Katz and Dr. Roger Burford. In rebuttal, petitioner recalled Professor Baldus and Dr. Woodworth, and presented further expert testimony from Dr. Richard Berk.

In a comprehensive opinion, reported at 580 F.Supp. 338, the district court concluded that petitioner failed to make out a prima facie case of discrimination in sentencing based on either the race of victims or the race of defendants. The Court discounted the disparities shown by the Baldus study on the ground that the research (1) showed substantial flaws in the data base, as shown in tests revealing coding errors and mismatches between items on the Procedural Reform Study (PRS) and Comprehensive Sentencing Study (CSS) quesctionnaires; (2) lacked accuracy and showed flaws in the models, primarily because the models do not measure decisions based on knowledge available to decisionmaker and only predicts outcomes in 50 percent of the cases; and (3) demonstrated multi-collinearity among model variables, showing interrelationship among the variables and consequently distorting relationships, making interpretation difficult.

The district court further held that even if a prima facie case had been established, the state had successfully rebutted the showing because: (1) the results were not the product of good statistical methodology, (2) other explanations for the study results could be demonstrated, such as, white victims were acting as proxies for aggravated cases, and (3) black-victim cases being left behind at the life sentence and voluntary manslaughter stages, are less aggravated and more mitigated than the white-victim cases disposed of in similar fashion.

The district court concluded that petitioner failed to carry his ultimate burden of persuasion, because there is no consistent statistically significant evidence that the death penalty is being imposed on the basis of the race of defendant. In particular there was no statistically significant evidence produced to show that prosecutors

are seeking the death penalty or juries are imposing the death penalty because the defendant is black or the victim is white. Petitioner conceded that the study is incapable of demonstrating that he was singled out for the death penalty because of the race of either himself or his victim, and, therefore, petitioner failed to demonstrate that racial considerations caused him to receive the death penalty.

We adopt the following approach in addressing the argument that the district court erred in refusing to hold that the Georgia statute is unconstitutionally applied in light of the statistical evidence. First, we briefly describe the statistical Baldus study that was done in this case. Second, we discuss the evidentiary value such studies have in establishing the ultimate facts that control a constitutional decision. Third, we discuss the constitutional law in terms of what must be proved in order for petitioner to prevail on an argument that a state capital punishment law is unconstitutionally applied because of race discrimination. Fourth, we discuss whether a generalized statistical study such as this could ever be sufficient to prove the allegations of ultimate fact necessary to sustain a successful constitutional attack on a defendant's sentence. Fifth, we discuss whether this study is valid to prove what it purports to prove. Sixth, we decide that this particular study, assuming its validity and that it proves what it claims to prove, is insufficient to either require or support a decision for petitioner.

In summary, we affirm the district court on the ground that, assuming the validity of the research, it would not support a decision that the Georgia law was being unconstitutionally applied, much less would it compel such a finding, the level which petitioner would have to reach

in order to prevail on this appeal.

## The Baldus Study

The Baldus study analyzed the imposition of sentence in homicide cases to determine the level of disparities attributable to race in the rate of the imposition of the death sentence. In the first study, Procedural Reform Study (PRS), the results revealed no race-of-defendant effects whatsoever, and the results were unclear at that stage as to race-of-victim effects.

The second study, the Charging and Sentencing Study (CSS), consisted of a random stratified sample of all persons indicted for murder from 1973 through 1979. The study examined the cases from indictment through sentencing. The purpose of the study was to estimate racial effects that were the product of the combined effects of all decisions from the point of indictment to the point of the final death-sentencing decision, and to include strength of the evidence in the cases.

The study attempted to control for all of the factors which play into a capital crime system, such as aggravating circumstances, mitigating circumstances, strength of evidence, time period of imposition of sentence, geographical areas (urban/rural), and race of defendant and victim. The data collection for these studies was exceedingly complex, involving cumbersome data collection instruments, extensive field work by multiple data collectors and sophisticated computer coding, entry and data cleaning processes.

Baldus and Woodworth completed a multitude of statistical tests on the data consisting of regression analysis, indexing factor analysis, cross tabulation, and triangulation. The results showed a 6% racial effect systemwide for white victim, black defendant cases with an increase to 20% in the mid-range of cases. There was no suggestion that a uniform, institutional bias existed that adversely affected defendants in white victim cases in all circumstances or a black defendant in all cases.

The object of the Baldus study in Fulton County, where McCleskey was convicted, was to determine whether the sentencing pattern disparities that were observed statewide with respect to race of the victim and race of defendant were pertinent to Fulton County, and whether the evidence concerning Fulton County shed any light on Warren McCleskey's death sentence as an aberrant death sentence, or whether racial considerations may have

played a role in the disposition of his case.

Because there were only ten cases involving police officer victims in Fulton County, statistical analysis could not be utilized effectively. Baldus conceded that it was difficult to draw any inference concerning the overall race effect in these cases because there had only been one death sentence. He concluded that based on the data there was only a possibility that a racial factor existed in McCleskey's case.

#### Social Science Research Evidence

To some extent a broad issue before this Court concerns the role that social science is to have in judicial decisionmaking. Social science is a broad-based field consisting of many specialized discipline areas, such as psychology, anthropology, economics, political science, history and sociology. Cf. Sperlich, Social Science Evidence and the Courts: Reaching Beyond the Advisory Process, 63 Judicature 280, 283 n. 14 (1980). Research consisting of parametric and nonparametric measures is conducted under both laboratory controlled situations and uncontrolled situations, such as real life observational situations, throughout the disciplines. The broad objectives for social science research are to better understand mankind and its institutions in order to more effectively plan, predict, modify and enhance society's and the individual's circumstances. Social science as a nonexact science is always mindful that its research is dealing with highly complex behavioral patterns that exist in a highly technical society. At best, this research "models" and "reflects" society and provides society with trends and information for broad-based generalizations. The researcher's intent is to use the conclusions from research to predict, plan, describe, explain, understand or modify. To utilize conclusions from such research to explain the specific intent of a specific behavioral situation goes beyond the legitimate uses for such research. Even when this research is at a high level of exactness, in design and results, social scientists readily admit their steadfast hesitancies to conclude such results can explain specific behavioral actions in a certain situation.

The judiciary is aware of the potential limitations inherent in such research: (1) the imprecise nature of the discipline; (2) the potential inaccuracies in presented data; (3) the potential bias of the researcher; (4) the inherent problems with the methodology; (5) the specialized training needed to assess and utilize the data competently, and (6) the debatability of the appropriateness for courts to use empirical evidence in decisionmaking. Cf. Henry, Introduction: A Journey into the Future—The Role of Empirical Evidence in Developing Labor Law, 1981 U.Ill.L.Rev. 1, 4; Sperlich, 63 Judicature at 283 n. 14.

Historically, beginning with "Louis Brandeis' use of empirical evidence before the Supreme Court . . . persuasive social science evidence has been presented to the courts." Forst, Rhodes & Wellford, Sentencing and Social Science: Research for the Formulation of Federal Guidelines, 7 Hofstra L.Rev. 355 (1979). See Muller v. Oregon. 208 U.S. 412, 28 S.Ct. 324, 52 L.Ed. 551 (1908); Brown v. Board of Education, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954). The Brandeis brief presented social facts as corroborative in the judicial decisionmaking process. O'Brien, Of Judicial Myths, Motivations and Justifications: A Postscript on Social Science and the Law, 64 Judicature 285, 288 (1981). The Brandeis brief "is a well-known technique for asking the court to take judicial notice of social facts." Sperlich, 63 Judicature at 280, 285 n. 31. "It does not solve the problem of how to bring valid scientific materials to the attention of the court. . . . Brandeis did not argue that the data were valid, only that they existed. . . . The main contribution . . . was to make extra-legal data readily available to the court." Id.

This Court has taken a position that social science research does play a role in judicial decisionmaking in certain situations, even in light of the limitations of such research. Statistics have been used primarily in cases addressing discrimination.

Statistical analysis is useful only to show facts. In evidentiary terms, statistical studies based on correlation are circumstantial evidence. They are not direct evidence. Teamsters v. United States, 431 U.S. 324, 340, 97 S.Ct. 1843, 1856, 52 L.Ed.2d 396 (1977). Statistical studies do not purport to state what the law is in a given situation. The law is applied to the facts as revealed by the research.

In this case the realities examined, based on a certain set of facts reduced to data, were the descriptive characteristics and numbers of persons being sentenced to death in Georgia. Such studies reveal, as circumstantial evidence through their study analyses and results, possible, or probable, relationships that may exist in the realities studied.

The usefulness of statistics obviously depends upon what is attempted to be proved by them. If disparate impact is sought to be proved, statistics are more useful than if the causes of that impact must be proved. Where intent and motivation must be proved, the statistics have even less utility. This Court has said in discrimination cases, however, "that while statistics alone usually cannot establish intentional discrimination, under certain limited circumstances they might." Spencer v. Zant, 715 F.2d 1562, 1581 (11th Cir. 1983), on pet. for reh'g and for reh'g en banc, 729 F.2d 1293 (11th Cir. 1984). See also Eastland v. Tennessee Valley Authority, 704 F.2d 613. 618 (11th Cir. 1983); Johnson v. Uncle Ben's, Inc., 628 F.2d 419, 421 (5th Cir. 1980), cert. denied, 459 U.S. 967, 103 S.Ct. 293, 74 L.Ed.2d 277 (1982). These limited ircumstances are where the statistical evidence of racially disproportionate impact is so strong as to permit no inference other than that the results are the product of a racially discriminatory intent or purpose. See Smith v. Balkcom, 671 F.2d 858 (5th Cir. Unit B), cert. denied, 459 U.S. 882, 103 S.Ct. 181, 74 L.Ed.2d 148 (1982).

Statistical evidence has been received in two ways. The United States Supreme Court has simply recognized the existence of statistical studies and social science research in making certain decisions, without such studies being subject to the rigors of an evidentiary hearing. Muller v. Oregon, 208 U.S. 412, 28 S.Ct. 324, 52 L.Ed. 551 (1908); Fowler v. North Carolina, 428 U.S. 904, 96 S.Ct. 3212, 49 L.Ed.2d 1212 (1976); Woodson v. North Carolina, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976); Jurek v. Texas, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976); Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed2d 913 (1976); Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). The "Supreme Court, for example, encountered severe criticism and opposition to its rulings on desegregation of public schools, the exclusionary rule, and the retroactivity of its decisions, precisely because the court relied on empirical generalization." O'Brien, The Seduction of the Judiciary: Social Science and the Courts, 64 Judicature 8, 19 (1980). In each of these situations the Court "focused" beyond the specifics of the case before it to the "institutions" represented and through a specific ruling effected changes in the institutions. On the other hand, statistical evidence may be presented in the trial court through direct testimony and cross-examination on statistical information that bears on an issue. Such evidence is examined carefully and subjected to the tests of relevancy, authenticity, probativeness and credibility. Cf. Henry, 1981 U.Ill.L.Rev. at 8.

One difficulty with statistical evidence is that it may raise more questions than it answers. This Court reached that conclusion in Wilkins v. University of Houston, 654 F.2d 388 (5th Cir. Unit A 1981). In Wilkins this Court held that "[m]ultiple regression analysis is a relatively sophisticated means of determining the effects that any number of different factors have on a particular variable." Id. at 402-03. This Court noted that the methodology "is subject to misuse and thus must be employed with great

care." Id. at 403. Procedurally, when multiple regression is used "it will be the subject of expert testimony and knowledgeable cross-examination from both sides. In this manner, the validity of the model and the significance of its results will be fully developed at trial, allowing the trial judge to make an informed decision as to the probative value of the analysis." Id. Having done this, the Wilkins Court, in an employment discrimination case, held "the statistical evidence associated with the multiple regression analysis is inconclusive raising more questions than it answers." Id.

Even if the statistical evidence is strong there is generally a need for additional evidence. In Wade v. Mississippi Cooperative Extension Serv., 528 F.2d 508 (5th Cir. 1976), the results drawn from the multivariate regression analysis were supported by additional evidence. Id. at 517. In Wade the statistics did not "stand alone" as the sole proof of discrimination.

Much has been written about the relationship of law and social science. "If social science cannot produce the required answers, and it probably cannot, its use is likely to continue to lead to a disjointed incrementalism." Daniels, Social Science And Death Penalty Cases, 1 Law & Pol'y Q. 336, 367 (1979). "Social science can probably make its greatest contribution to legal theory by investigating the causal forces behind judicial, legislative and administrative decisionmaking and by probing the general effects of such decisions." Nagel, Law And The Social Sciences: What Can Social Science Contribute? 356 A.B. A.J. 356, 357-58 (1965).

With these observations, the Court accepts social science research for what the social scientist should claim for it. As in all circumstantial evidence cases, the inferences to be drawn from the statistics are for the factfinder, but the statistics are accepted to show the circumstances.

Racial Discrimination, the Death Penalty, and the Constitution

McCleskey contends his death sentence is unconstitutional because Georgia's death penalty is discriminatorily applied on the basis of the race of the defendant and the victim. Several different constitutional bases for this claim have been asserted. McCleskey relies on the arbitrary, capricious and irrational components of the prohibition of cruel and unusual punishment in the Eighth Amendment and the equal protection clause of the Fourteenth Amendment. The district court though that with respect to race-of-the-victim discrimination the petitioner more properly stated a claim under the due process clause of the Fourteenth Amendment.

Claims of this kind are seldom asserted with a degree of particularity, and they generally assert several constitutional precepts. On analysis, however, there seems to be little difference in the proof that might be required to

prevail under any of the three theories.

In Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), the Supreme Court struck down the Georgia death penalty system on Eighth Amendment grounds, with several of the concurring justices holding that the system operated in an arbitrary and capricious manner because there was no rational way to distinguish the few cases in which death was imposed from the many in which it was not. Id. at 313, 92 S.Ct. at 2764 (White, J., concurring): id. at 309-10, 92 S.Ct. at 2762-63 (Stewart, J. concurring). Although race discrimination in the imposition of the death penalty was not the basis of the decision, it was one of several concerns addressed in both the concurring and dissenting opinions. See id. at 249-52, 92 S.Ct. at 2731-33 (Douglas, J. concurring); id. at 309-10, 92 S.Ct. at 2762-63 (Stewart, J. concurring); id. at 364-65, 92 S.Ct. at 2790-91 (Marshall, J., concurring); id. at 389-90 n. 12, 92 S.Ct. at 2803-04 n. 12 (Burger, C.J., dissenting); id. at 449, 92 S.Ct. at 2833 (Powell, J., dissenting).

Four years later, the Supreme Court approved the redrawn Georgia statute pursuant to which McCleskey was tried and sentenced. Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). At the same time the Court approved statutes from Florida and Texas which, like Georgia, followed a guided discretion approach, but invalidated the mandatory sentencing procedure of North Carolina and Louisiana. Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976); Jurek v. Texas, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976); Woodson v. North Carolina, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976); Roberts v. Louisiana, 428 U.S. 325, 96 S.Ct. 3001, 49 L.Ed.2d 974 (1976).

Since Gregg, we have consistently held that to state a claim of racial discrimination in the application of a constitutional capital statute, intent and motive must be alleged. Sullivan v. Wainwright, 721 F.2d 316, 317 (11th Cir.1983) (statistical impact studies insufficient to show state system "intentionally discriminated against petitioner"), petition for stay of execution denied, — U.S. ---, 104 S.Ct. 450, 78 L.Ed.2d 210 (1983); Adams v. Wainwright, 709 F.2d 1443, 1449 (11th Cir.1983) (requiring "a showing of an intent to discriminate" or "evidence of disparate impact . . . so strong that the only permissible inference is one of intentional discrimination"), cert. denied, — U.S. —, 104 S.Ct. 745, 79 L.Ed.2d 203 (1984); Smith v. Balkcom, 671 F.2d 858, 859 (5th Cir.Unit B) (requiring "circumstantial or statistical evidence of racially disproportionate impact . . . so strong that the results permit no other inference but that they are the product of a racially discriminatory intent or purpose"), cert. denied, 459 U.S. 882, 103 S.Ct. 181, 74 L.Ed.2d 148 (1982).

Initially in Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978), cert. denied, 440 U.S. 976, 99 S.Ct. 1548, 59 L.Ed.2d 796 (1979), the Court rejected Eighth and Fourteenth Amendment claims that the Florida death penalty was being applied in a discriminatory fashion on

the basis of the victim's race. The Spinkellink Court read Gregg and its companion cases "as holding that if a state follows a properly drawn statute in imposing the death penalty, then the arbitrariness and capriciousness and therefore the racial discrimination condemned in Furman-have been conclusively removed." Id. at 613-14: Spinkellink can not be read to foreclose automatically all Eighth Amendment challenges to capital sentencing conducted under a facially constitutional statute. Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980), the Supreme Court sustained an Eighth Amendment challenge to a Georgia death sentence because the Georgia court's construction of a portion of that facially valid statute left no principled way to distinguish the cases where the death penalty was imposed from those in which is was not. See Proffit v. Wainwright, 685 F.2d 1227, 1261 n. 52 (11th Cir.1982). Nevertheless, neither Godfrey nor Proffitt undermines this Court's prior and subsequent pronouncements in Spinkellink, Smith, Adams, and Sullivan regarding the amount of disparate impact that must be shown under either an Eighth Amendment or equal protection analysis.

As the district court here pointed out, such a standard indicates an analytical nexus between Eighth Amendment claims and a Fourteenth Amendment equal protection claim. McCleskey v. Zant, 580 F.Supp. 338, 347 (N.D.Ga. 1984). Where an Eighth Amendment claim centers around generalized showings of disparate racial impact in capital sentencing, such a connection is inescapable. Although conceivably the level or amount of disparate racial impact that would render a state's capital sentencing system arbitrary and capricious under the Eighth Amendment might differ slightly from the level or amount of disparate racial impact that would compel an inference of discriminatory intent under the equal protection clause of the Fourteenth Amendment, we do not need to decide whether there could be a difference in magnitude that would lead to opposite conclusions on a system's constitutionality depending on which theory a claimant asserts.

12

A successful Eighth Amendment challenge would require proof that the race factor was operating in the system in such a pervasive manner that it could fairly be said that the system was irrational, arbitrary and capricious. For the same reasons that the Baldus study would be insufficient to demonstrate discriminatory intent or unconstitutional discrimination in the Fourteenth Amendment context, it would be insufficient to show irrationality, arbitrariness and capriciousness under any kind of Eighth Amendment analysis.

The district court stated that were it writing on a clean slate, it would characterize McCleskey's claim as a due process claim. The court took the position that McCleskey's argument, while couched in terms of "arbitrary and capricious," fundamentally contended that the Georgia death penalty was applied on the basis of a morally impermissible criterion: the race of the victim.

The district court's theory derives some support from the Supreme Court's decision in Zant v. Stephens, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983). The Court there recognized that a state may not attach the "aggravating" label as an element in capital sentencing to factors that are constitutionally impermissible or totally irrelevant to the sentencing process, such as race. If that were done, the Court said, "due process would require that the jury's decision to impose death be set aside." Id. 462 U.S. at \_\_\_\_\_, 103 S.Ct. at 2747, 77 L.Ed. 2d at 255. From this language it is clear that due process would prevent a state from explicitly making the murder of a white victim an aggravating circumstance in capital sentencing. But where the statute is facially neutral, a due process claim must be supported by proof that a state, through its prosecutors, jurors, and judges, has implicitly attached the aggravating label to race.

Even if petitioner had characterized his claim as one under the due process clause, it would not have altered the legal standard governing the showing he must make to prevail. The application of the due process clause is "an uncertain enterprise which must discover what 'fundamental fairness' consists of in a particular situation by first considering any relevant precedents and they by assessing the several interests that are at stake." Lassiter v. Department of Social Services, 452 U.S. 18, 24-25, 101 S.Ct. 2153, 2158-2159, 68 L.Ed.2d 640 (1981). Due process also requires the assessment of the risk that the procedures being used will lead to erroneous decisions. Mathews v. Eldridge, 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18 (1976). Where a due process claim requires a court to determine whether the race of the victim impermissibly affected the capital sentencing process, decisions under the equal protection clause, characterized as "central to the Fourteenth Amendment's prohibition of discriminatory action by the State," Rose v. Mitchell, 443 U.S. 545, 554-55, 99 S.Ct. 2993, 2999-3000, 61 L.Ed.2d 739 (1979), are certainly "relevant precedents" in the assessment of the risk of erroneous decisions. Thus, as in the equal protection context, the claimant under a due process theory must present evidence which establishes that in the capital sentencing process race "is a motivating factor in the decision." Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 266, 97 S.Ct. 555, 563, 50 L.Ed.2d 450 (1977).

Due process and cruel and unusual punishment cases do not normally focus on the intent of the governmental actor. But where racial discrimination is claimed not on the basis of procedural faults or flaws in the structure of the law, but on the basis of the decisions made within that process, then purpose, intent and motive are a natural component of the proof that discrimination actually occurred.

The Supreme Court has clearly held that to prove a constitutional claim of racial discrimination in the equal protection context, intent, purpose, and motive are necessary components. *Washington v. Davis*, 426 U.S. 229, 238-42, 96 S.Ct. 2040, 2046-49, 48 L.Ed.2d 597

(1976). A showing of a disproportionate impact alone is not sufficient to prove discriminatory intent unless no other reasonable inference can be drawn. Arlington Heights, 429 U.S. at 264-66, 97 S.Ct. at 562-64. This Circuit has consistently applied these principles of law. Adams v. Wainwright, 709 F.2d 1443, 1449 (11th Cir. 1983), cert. denied, — U.S. —, 104 S.Ct. 745, 79 L.Ed.2d 203 (1984); Sullivan v. Wainwright, 721 F.2d 316, 317 (11th Cir. 1983).

We, therefore, hold that proof of a disparate impact alone is insufficient to invalidate a capital sentencing system, unless that disparate impact is so great that it compels a conclusion that the system is unprincipled, irrational, arbitrary and capricious such that purposeful discrimination—i.e., race is intentionally being used as a factor in sentencing—can be presumed to permeate the system.

Generalized Statistical Studies and the Constitutional Standard

The question initially arises as to whether any statewide study suggesting a racial disparity in the application of a state's death penalty could ever support a constitutional attack on a defendant's sentence. The answer lies in whether the statistical study is sufficient evidence of the ultimate fact which must be shown.

In Smith v. Balkcom, 671 F.2d 858, 859 (5th Cir.Unit B), cert. denied, 459 U.S. 882, 103 S.Ct. 181, 74 L.Ed.2d 148 (1982), this Court said:

In some instances, circumstantial or statistical evidence of racially disproportionate impact may be so strong that the results permit no other inference but that they are the product of a racially discriminatory intent or purpose.

This statement has apparently caused some confusion because it is often cited as a proposition for which it does not stand. Petitioner argues that his statistical study shows a strong inference that there is a disparity based on race. That is only the first step, however. The second step focuses on how great the disparity is. Once the disparity is proven, the question is whether that disparity is sufficient to compel a conclusion that it results from discriminatory intent and purpose. The key to the problem lies in the principle that the proof, no matter how strong, of some disparity is alone insufficient.

In Spinkellink v. Wainwright, 578 F.2d 582, 612 (5th Cir.1978), cert. denied, 440 U.S. 976, 99 S.Ct. 1548, 59 L.Ed.2d 796 (1979), the petitioner claimed the Florida statute was being applied in a discriminatory fashion against defendants murdering whites, as opposed to blacks, in violation of the cruel and unusual punishment and equal protection components of the Constitution. Evidence of this disparity was introduced through expert witnesses. The court assumed for sake of argument the accuracy of petitioner's statistics but rejected the Eighth Amendment argument. The court rejected the equal protection argument because the disparity shown by petitioner's statistics could not prove racially discriminatory intent or purpose as required by Washington v. Davis, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976), and Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977), 578 F.2d at 614-16.

In Adams v. Wainwright, 709 F.2d 1443 (11th Cir. 1983), cert. denied, — U.S. —, 104 S.Ct. 745, 79 L.Ed.2d 203 (1984), the court, in denying an evidentiary hearing, accepted statistics which arguably tended to support the claim that the Florida death penalty was imposed disproportionately in cases involving white vic-

tims. The court then said:

Disparate impact alone is insufficient to establish a violation of the fourteenth amendment. There must be a showing of an intent to discriminate. . . . Only if the evidence of disparate impact is so strong that the only permissible inference is one of intentional discrimination will it alone suffice.

709 F.2d at 1449 (citations omitted). Here again, in commencing on the strength of the evidence, the court was referring not to the amount or quality of evidence which showed a disparate impact, but the amount of disparate impact that would be so strong as to lead inevitably to a finding of motivation and intent, absent some other explanation for the disparity.

In commenting on the proffer of the Baldus study in another case, Justice Powell wrote in dissent from a stay of execution pending en banc consideration of this

case:

If the Baldus study is similar to the several studies filed with us in Sullivan v. Wainwright, —— U.S. ——, 104 S.Ct. 90, 78 L.Ed.2d 266 (1983), the statistics in studies of this kind, many of which date as far back as 1948, are merely general statistical surveys that are hardly particularized with respect to any alleged "intentional" racial discrimination. Surely, no contention can be made that the entire Georgia judicial ssytem, at all levels, operates to discriminate in all cases. Arguments to this effect may have been directed to the type of statutes addressed in Furman v. Georgia, 408 U.S. 238 [92 S.Ct. 2726, 33 L.Ed.2d 346] (1972). As our subsequent cases make clear, such arguments cannot be taken seriously under statutes approved in Gregg.

Stephens v. Kemp. — U.S. —, — n. 2, 104 S.Ct. 562, 564 n. 2, 78 L.Ed.2d 370, 374 n. 2 (1984) (Powell, J., dissenting).

The lesson from these and other cases must be that generalized statistical studies are of little use in deciding whether a particular defendant has been unconstitutionally sentenced to death. As to whether the system can survive constitutional attack, statistical studies at most are probative of how much disparity is present, but it is a legal question as to how much disparity is required before a federal court will accept it as evidence of the constitutional flaws in the system.

This point becomes especially critical to a court faced with a request for an evidentiary hearing to produce future studies which will undoubtedly be made. Needless to say, an evidentiary hearing would be necessary to hear any evidence that a particular defendant was discriminated against because of his race. But general statistical studies of the kind offered here do not even purport to prove that fact. Aside from that kind of evidence, however, it would not seem necessary to conduct a full evidentiary hearing as to studies which do nothing more than show an unexplainable disparity. Generalized studies would appear to have little hope of excluding every possible factor that might make a difference between crimes and defendants, exclusive of race. To the extent there is a subjective or judgmental component to the discretion with which a sentence is investigated, not only will no two defendants be seen identical by the sentencers, but no two sentencers will see a single case precisely the same. As the court has recognized, there are "countless racially neutral variables" in the sentencing of capital cases. Smith v. Balkcom, 617 F.2d at 859.

This is not to recede from the general proposition that statistical studies may reflect a disparity so great as to inevitably lead to a conclusion that the disparity results from intent or motivation. As decided by this opinion, the Baldus studies demonstrate that the Georgia system does not contain the level of disparity required to meet that constitutional standard.

## Validity of the Baldus Study

The social science research of Professor Baldus purports to reveal, through statistical analysis, disparities in the sentencing of black defendants in white victim cases in Georgia. A study is valid if it measures what it purports to measure. Different studies have different levels of validity. The level of the validity of the study is directly related to the degree to which the social scientist can rely on the findings of the study as measuring what it claims to measure.

The district court held the study to be invalid because of perceived errors in the data base, the deficiencies in the models, and the multi-collinearity existing between the independent variables. We hold in this case that even if the statistical results are accepted as valid, the evidence fails to challenge successfully the constitutionality of the Georgia system. Because of this decision, it is not necessary for us to determine whether the district court was right or wrong in its faulting of the Baldus study.

The district court undertook an extensive review of the research presented. It received, analyzed and dealt with the complex statistics. The district court is to be commended for its outstanding endeavor in the handling of the detailed aspects of this case, particularly in light of the consistent arguments being made in several cases based on the Baldus study. Any decision that the results of the Baldus study justify habeas corpus relief would have to deal with the district court's findings as to the study itself. Inasmuch as social science research has been used by appellate courts in decisionmaking, Muller v. Oregon, 208 U.S. 412, 419-21, 28 S.Ct. 324, 325-26, 52 L.Ed. 551 (1980), and has been tested like other kinds of evidence at trial, see Spinkellink v. Wainwright, 578 F.2d 582, 612-13 (5th Cir.1978), there is a question as to the standard of review of a trial court's finding based on a highly complex statistical study.

Findings of fact are reviewed under the clearly erroneous standard which the Supreme Court has defined as: "[a] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." United States v. United States Gypsum Co., 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746 (1948).

Whether a disparate impact reflects an intent to discriminate is an ultimate fact which must be reviewed under the clearly erroneous standard. *Pullman-Standard v. Swint*, 456 U.S. 273, 102 S.Ct. 1781, 72 L.Ed.2d 66 (1982). In *Pullman*, the Supreme Court said that Fed.R.Civ.P. 52(a)

does not make exceptions or purport to exclude certain categories of factual findings from the obligation of a court of appeals to accept a district court's findings unless clearly erroneous. It does not divide facts into categories; in particular, it does not divide findings of fact into those that deal with 'ultimate' and those that deal with 'subsidiary' facts.

456 U.S. at 287, 102 S.Ct. at 1789.

There would seem to be two levels of findings based on statistical evidence that must be reviewed: first, the finding concerning the validity of the study itself, and second, the finding of ultimate fact based upon the circumstantial evidence revealed by the study, if valid.

The district court here found the study invalid. The court found the statistics of the study to be particularly troublesome in the areas of the data base, the models, and the relationship between the independent variables. McCleskey v. Zant, 580 F.Supp. 338, 379 (N.D.Ga.1984). We pretermit a review of this finding concerning the validity of the study itself. The district court went on to hold that even if the statistics did validly reflect the Georgia system, the ultimate fact of intent to discriminate was not proven. We review this finding of fact by assuming the validity of the study and rest our holding on the decision that the study, even if valid, not only supports the district judge's decision under the clearly erroneous standard of review, but compels it.

Sufficiency of Baldus Study

McCleskey argues that, although the post-Furman statute in Georgia now yields more predictable results, the race of the victim is a significant, but of course impermissible, factor which accounts for the imposition of the death penalty in many cases. He supports this argument with the sophisticated Baldus statistical study that, after controlling for the legitimate factors that might rationally explain the imposition of the penalty, purportedly reveals significant race-of-the-victim influence in the system; i.e., all other things being equal, white victim crimes are more likely to result in the penalty. Because the Constitution prohibits the consideration of racial factors as justification for the penalty, McCleskey asserts that the discernible racial influence on sentencing renders the operation of the Georgia system infirm.

In addition, McCleskey asserts that the race-of-thevictim influence on the system is particularly significant in the range of cases involving intermediate levels of aggravation (mid-range aggravation cases). He argues that because his case fell within that range, he has established that impermissible racial considerations operated in his case.

We assume without deciding that the Baldus study is sufficient to show what it purports to reveal as to the application of the Georgia death penalty. Baldus concluded that his study showed that systematic and substantial disparities existed in the penalties imposed upon homicide defendants in Georgia based on race of the homicide victim, that the disparities existed at a less substantial rate in death sentening based on race of defendants, and that the factors of race of the victim and defendant were at work in Fulton County.

A general comment about the limitations on what the Baldus study purports to show, although covered in the subsequent discussion, may be helpful. The Baldus study statistical evidence does not purport to show that McCleskey was sentenced to death because of either his race or the race of his victim. It only shows that in a group involving blacks and whites, all of whose cases are virtually the same, there would be more blacks receiving the death penalty than whites and more murderers of whites receiving the death penalty than murderers of blacks. The statisticans' "best guess" is that race was a factor in those cases and has a role in sentencing structure in Georgia. These general statements about the results are insufficient to make a legal determination. An analysis must be made as to how much disparity is actually shown by the research.

Accepting the Baldus figures, but not the general conclusion, as accurately reflecting the Georgia experience, the statistics are inadequate to entitle McCleskey to relief on his constitutional claim.

The Georgia-based retrospective study consisted of a stratified random sample of 1,066 cases of individuals indicted for murder-death, murder-life and voluntary manslaughter who were arrested between March 28, 1973 and December 31, 1978. The data were compiled from a 41-page questionnaire and consisted of more than 500,000 entries. Through complex statistical analysis, Baldus examined relationships between the dependent variable, death-sentencing rate, and independent variables, nine aggravating and 75 mitigating factors, while controlling for background factors. In 10% of the cases a penalty trial was held, and in 5% of the cases defendants were sentenced to death.

The study subjects the Georgia data to a multitude of statistical analyses, and under each method there is a statistically significant race-of-the-victim effect operating statewide. It is more difficult, however, to ascertain the magnitude of the effect demonstrated by the Baldus study. The simple, unadjusted figures show that death sentences were imposed in 11% of the white victim cases potentially eligible for the death penalty, and in 1% of the eligible black victim cases. After controlling for various

legitimate factors that could explain the differential, Baldus still concluded that there was a significant race-of-the-victim effect. The result of Baldus' most conclusive model, on which McCleskey primarily relies, showed an effect of .06, signifying that on average a white victim crime is 6% more likely to result in the sentence than a comparable black victim crime. Baldus also provided tables that showed the race-of-the-victim effect to be most significant in cases involving intermediate levels of aggravation. In these cases, on average, white victim crimes were shown to be 20% more likely to result in the death penalty than equally aggravated black victim crimes.

None of the figures mentioned above is a definitive quantification of the influence of the victim's race on the overall likelihood of the death penalty in a given case. Nevertheless, the figures all serve to enlighten us somewhat on how the system operates. The 6% average figure is a composite of all cases and contains both low aggravation cases, where the penalty is almost never imposed regardless of the victim's race, and high aggravation cases, where both white and black victim crimes are likely to result in the penalty. When this figure is related to tables that classify cases according to the level of aggravation, the 6% average figure is properly seen as an aggregate containing both cases in which race of the victim is a discernible factor and those in which it is not.

McCleskey's evidence, and the evidence presented by the state, also showed that the race-of-the-victim factor diminishes as more variables are added to the model. For example, the bottom line figure was 17% in the very simple models, dropped to 6% in the 230-variable model, and finally fell to 4% when the final 20 variables were added and the effect of Georgia Supreme Court review was considered.

The statistics are also enlightening on the overall operation of the legitimate factors supporting the death sentence. The Baldus study revealed an essentially rational system, in which high aggravation cases were more likely to result in the death sentence than low aggravation cases. As one would expect in a rational system, factors such as torture and multiple victims greatly in-

creased the likelihood of receiving the penalty.

There are important dimensions that the statistics cannot reveal. Baldus testified that the Georgia death penalty system is an extremely complicated process in which no single factor or group of factors determines the outcome of a given case. No single petitioner could, on the basis of these statistics alone, establish that he received the death sentence because, and only because, his victim was white. Even in the mid-range of cases, where the race-of-the-victim influence is said to be strong, legitimate factors justifying the penalty are, by the very definition of the mid-range, present in each case.

The statistics show there is a race-of-the-victim relationship with the imposition of the death sentence discernible in enough cases to be statistically significant in the system as a whole. The magnitude cannot be called

determinative in any given case.

The evidence in the Baldus study seems to support the Georgia death penalty system as one operating in a rational manner. Although no single factor, or combination of factors, will irrefutably lead to the death sentence in every case, the system in operation follows the pattern the legislature intended, which the Supreme Court found constitutional in *Gregg*, and sorts out cases according to levels of aggravation, as gauged by legitimate factors. The fundamental Eighth Amendment concern of *Furman*, as discussed in *Gregg*, which states that "there is no meaningful basis for distinguishing the few cases in which [the death sentence] is imposed from the many in which it is not" does not accurately describe the operation of the Georgia statute. 428 U.S. at 188, 96 S.Ct. at 2932.

Taking the 6% bottom line revealed in the Baldus figures as true, this figure is not sufficient to overcome the presumption that the statute is operating in a constitutional manner. In any discretionary system, some imprecision must be tolerated, and the Baldus study is simply insufficient to support a ruling, in the context of a statute that is operating much as intended, that racial factors are playing a role in the outcome sufficient to render the system as a whole arbitrary and capricious.

This conclusion is supported, and possibly even compelled, by recent Supreme Court opinions in Sullivan v. Wainwright, — U.S. —, 104 S.Ct. 450, 78 L.Ed.2d 210 (1983) (denying stay of execution to allow evidentiary hearing on Eighth Amendment claim supported by statistics); Wainwright v. Adams, - U.S. - , 104 S.Ct. 2183, 80 L.Ed.2d 809 (1984) (vacating stay); and Wainwright v. Ford, — U.S. —, 104 S.Ct. 3498, 82 L.Ed.2d. 911 (1984) (denying state's application to vacate stay on other grounds). A plurality of the Court in Ford definitively stated that it had held "in two prior cases that the statistical evidence relied upon by Ford to support his claim of discrimination was not sufficient to raise a substantial ground upon which relief might be granted." Id. at -, 104 S.Ct. at 3499, 82 L.Ed.2d at 912 (citing Sullivan and Adams, and Ford all relied on the study by Gross and Mauro of the Florida death penalty system. The bottom line figure in the Gross and Mauro study indicated a race-of-the-victim effect, quantified by a "death odds multiplier," of about 4.8 to 1. Using a similar methodology, Baldus obtained a death odds multiplier of 4.3 to 1 in Georgia.

It is of course possible that the Supreme Court was rejecting the methodology of the Florida study, rather than its bottom line. It is true that the methodology of the Baldus study is superior. The posture of the Florida cases, however, persuades this Court that the Supreme Court was not relying on inadequacies in the methodology of the Florida study. The issue in Sullivan, Adams, and

Ford was whether the petitioner's proffer had raised a substantial ground sufficient to warrant an evidentiary hearing. In that context, it is reasonable to suppose that the Supreme Court looked at the bottom line indication of racial effect and held that it simply was insufficient to state a claim. A contrary assumption, that the Supreme Court analyzed the extremely complicated Gross and Mauro study and rejected it on methodological grounds, is much less reasonable.

Thus, assuming that the Supreme Court in Sullivan, Adams and Ford found the bottom line in the Gross and Mauro study insufficient to raise a constitutional claim, we would be compelled to reach the same result in analyzing the sufficiency of the comparable bottom line in the

Baldus study on which McCleskey relies.

McCleskey's argument about the heightened influence of the race-of-the-victim factor in the mid-range of cases, requires a somewhat different analysis. McCleskey's case falls within the range of cases involving intermediate levels of aggravation. The Baldus statistical study tends to show that the race-of-the-victim relationship to sentencing outcome was greater in these cases than in cases involving very low or very high levels of aggravation.

The race-of-the-victim effect increases the likelihood of the death penalty by approximately 20% in the midrange of cases. Some analysis of this 20% figure is ap-

propriate.

The 20% figure in this case is not analogous to a figure reflecting the percentage disparity in a jury composition case. Such a figure represents the *actual* disparity between the number of minority persons on the jury venire and the number of such persons in the population. In contrast, the 20% disparity in this case does not purport to be an actual disparity. Rather, the figure reflects that the variables included in the study do not adequately explain the 20% disparity and that the statisticians can explain it only by assuming the racial effect. More im-

portantly, Baldus did not testify that he found statistical significance in the 20% disparity figure for mid-range cases, and he did not adequately explain the rationale of his definition of the mid-range of cases. His testimony leaves this Court unpersuaded that there is a rationally classified, well-defined class of cases in which it can be demonstrated that a race-of-the-victim effect is operating with a magnitude approximating 20%.

Assuming arguendo, however, that the 20% disparity is an accurate figure, it is apparent that such a disparity only in the mid-range cases, and not in the system as a whole, cannot provide the basis for a system-wide challenge. As previously discussed, the system as a whole is operating in a rational manner, and not in a manner that can fairly be labeled arbitrary or capricious. A valid system challenge cannot be made only against the mid-range of cases. Baldus did not purport to define the mid-range of cases; nor is such a definition possible. It is simply not satisfactory to say that the racial effect operates in "close cases" and therefore that the death penalty will be set aside in "close cases."

As discussed previously, the statistics cannot show that the race-of-the-victim factor operated in a given case, even in the mid-range. Rather, the statistics show that, on average, the race-of-the-victim factor was more likely to affect the outcome in mid-range cases than in those cases at the high and low ends of the spectrum of aggravation. The statistics alone are insufficient to show that McCleskey's sentence was determined by the race of his victim, or even that the race of his victim contributed to the imposition of the penalty in this case.

McCleskey's petition does not surmount the threshold burden of stating a claim on this issue. Aside from the statistics, he presents literally no evidence that might tend to support a conclusion that the race of McCleskey's victim in any way motivated the jury to impose the death sentence in his case.

#### Conclusion

The Supreme Court has held that to be constitutional the sentencer in death sentence cases must have some measure of discretion. *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976). The mandatory death sentence statutes were declared unconstitutional. *Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976); *Roberts v. Louisiana*, 428 U.S. 325, 96 S.Ct. 3001, 49 L.Ed.2d 974 (1976).

The very exercise of discretion means that persons exercising discretion may reach different results from exact duplicates. Assuming each result is within the range of discretion, all are correct in the eyes of the law. It would not make sense for the system to require the exercise of discretion in order to be facially constitutional, and at the same time hold a system unconstitutional in application where that discretion achieved different results for what appear to be exact duplicates, absent the state showing the reasons for the difference. The discretion is narrow, focused and directed, but still there is a measure of discretion.

The Baldus approach, however, would take the case with different results on what are contended to be duplicate facts, where the differences could not be otherwise explained, and conclude that the different result was based on race alone. From a legal perspective, petitioner would argue that since the difference is not explained by facts which the social scientist thinks satisfactory to explain the differences, there is a prima facie case that the difference was based on unconstitutional factors, and the burden would shift to the state to prove the difference in results from constitutional considerations. This approach ignores the realities. It not only ignores quantitative differences in cases: looks, age, personality, education, profession, job, clothes, demeanor, and remorse, just to name a few, but it is incapable of measuring qualitative differences of such things as aggravating and mitigating factors. There are, in fact, no exact duplicates in capital crimes and capital defendants. The type of research submitted here tends to show which of the directed factors were effective, but is of restricted use in showing what undirected factors control the exercise of constitutionally required discretion.

It was recognized when *Gregg* was decided that the capital justice system would not be perfect, but that it need not be perfect in order to be constitutional. Justice

White said:

Petitioner has argued, in effect, that no matter how effective the death penalty may be as a punishment, government, created and run as it must be by humans, is inevitably incompetent to administer it. This cannot be accepted as a proposition of constitutional law. Imposition of the death penalty is surely an awesome responsibility for any system of justice and those who participate in it. Mistakes will be made and discriminations will occur which will be difficult to explain. However, one of society's most basic tasks is that of protecting the lives of its citizens and one of the most basic ways in which it achieves the task is through criminal laws against murder.

Gregg v. Georgia, 428 U.S. 153, 226, 96 S.Ct. 2909, 2949, 49 L.Ed.2d 859 (1976) (White, J., concurring).

The plurality opinion of the Gregg Court noted:

The petitioner's regumen is nothing more than a veiled contention to the Turman indirectly outlawed capital punishment by placing totally unrealistic conditions on its use. In order to repair the alleged defects pointed to by the petitioner, it would be necessary to require that prosecuting authorities charge a capital offense whenever arguably there had been a capital murder and that they refuse to plea bargain with the defendant. If a jury refused to convict even though the evidence supported the charge, its verdict

would have to be reversed and a verdict of guilty entered or a new trial ordered, since the discretionary act of jury nullification would not be permitted. Finally, acts of executive elemency would have to be prohibited. Such a system, of course, would be totally alien to our notions of criminal justice.

1d. at 199 n. 50, 96 S.Ct. at 2937 n. 50 (opinion of Stewart, Powell, and Stevens, JJ.).

Viewed broadly, it would seem that the statistical evidence presented here, assuming its validity, confirms rather than condemns the system. In a state where past discrimination is well documented, the study showed no discrimination as to the race of the defendant. The marginal disparity based on the race of the victim tends to support the state's contention that the system is working far differently from the one which Furman condemned. In pre-Furman days, there was no rhyme or reason as to who got the death penalty and who did not. But now, in the vast majority of cases, the reasons for a difference are well documented. That they are not so clear in a small percentage of the cases is no reason to declare the entire system unconstitutional.

The district court properly rejected this aspect of McCleskey's claim.

## INEFFECTIVE ASSISTANCE OF COUNSEL

McCleskey contends his trial counsel rendered ineffective assistance at both guilt/innocence and penalty phases of his trial in violation of the Sixth Amendment.

Although a defendant is constitutionally entitled to reasonably effective assistance from his attorney, we hold that McCleskey has not shown he was prejudiced by the claimed defaults in his counsel's performance. Ineffective assistance warrants reversal of a conviction only when there is a reasonable probability that the attorney's errors altered the outcome of the proceeding. A court may decide an ineffectiveness claim on the ground

of lack of prejudice without considering the reasonableness of the attorney's performance. Strickland v. Washington, —— U.S. ——, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

As to the guilt phase of his trial, McCleskey claims that his attorney failed to: (1) interview the prisoner who testified that McCleskey gave a jail house confession; (2) interview and subpoena as defense witnesses the victims of the Dixie Furniture Store robbery; and (3) interview the State's ballistics expert.

McCleskey demonstrates no prejudice caused by his counsel's failure to interview Offie Evans. We have held there was no reasonable likelihood that the disclosure of the detective's statement to Offie Evans would have affected the verdict. There is then no "reasonable probability" that the attorney's failure to discover this evidence affected the verdict.

As to the robbery victims, McCleskey does not contend that an in-person interview would have revealed something their statements did not. He had an opportunity to cross-examine several of the robbery victims and investigating officers at McCleskey's preliminary hearing. The reasonablness of the attorney's investigation need not be examined because there was obviously no prejudice.

The question is whether it was unreasonable not to subpoen the robbery victims as defense witnesses. McCleskey's attorney relied primarily on an alibi defense at trial. To establish this defense, the attorney put McCleskey on the stand. He also called several witnesses in an attempt to discredit a Dixie Furniture Store employee's identification of McCleskey and to show that McCleskey's confession was involuntary. It would have undermined his defense if the attorney had called witnesses to testify as to which robber did the shooting. No prejudice can be shown by failing to subpoena witnesses as a reasonable strategy decision.

McCleskey's attorney could have reasonably prepared to cross-examine the State's ballistics expert by reading the expert's report. No in-person interview was necessary. See Washington v. Watkins, 655 F.2d 1346, 1358 (5th Cir.1981), cert. denied, 456 U.S. 949, 102 S.Ct. 2021, 72 L.Ed.2d 474 (1982). The report was in the prosecutor's file which the attorney reviewed and no contention has been made that he did not read it.

As to the sentencing phase of his trial, McCleskey asserts his attorney failed to investigate and find character witnesses and did not object to the State's introduction of prior convictions which had been set aside.

No character witnesses testified for McCleskey at his trial. At the State habeas corpus hearing McCleskey's attorney testified he talked with both McCleskey and his sister about potential character witnesses. They suggested no possibilities. The sister refused to testify and advised the attorney that their mother was too sick to travel to the site of the trial. McCleskey and his sister took the stand at the State habeas corpus hearing and told conflicting stories. It is clear from the state court's opinion that it believed the attorney:

Despite the conflicting evidence on his point, . . . the Court is authorized in its role as fact finder to conclude that Counsel made all inquiries necessary to present an adequate defense during the sentencing phase. Indeed, Counsel could not present evidence that did not exist.

Although this "finding of fact" is stated in terms of the ultimate legal conclusion, implicit in that conclusion is the historical finding that the attorney's testimony was credible. See Paxton v. Jarvis, 735 F.2d 1306, 1308 (11th Cir.1984); Cox v. Montgomery, 718 F.2d 1036 (11th Cir.1983). This finding of fact is entitled to a presumption of correctness. Based on the facts as testified to by the attorney, he conducted a reasonable investigation for the character witnesses.

As evidence of an aggravating circumstance the prosecutor introduced three convictions resulting in life sentences, all of which had been set aside on Fourth Amendment grounds. This evidence could not result in any undue prejudice, because although the convictions were overturned, the charges were not dropped and McCleskey pleaded guilty and received sentences of 18 years. The reduction in sentence was disclosed at trial.

The district court properly denied relief on the ineffectiveness of counsel claim.

#### DEATH-ORIENTED JURY

Petitioner claims the district court improperly upheld the exclusion of jurors who were adamantly opposed to capital punishment. According to petitioner, this exclusion violated his right to be tried by an impartial and unbiased jury drawn from a representative cross-section of his community. In support of this proposition, petitioner cites two district court opinions from outside circuits. Grigsby v. Mabry, 569 F.Supp. 1273 (E.D. Ark.1983), hearing en banc ordered, No. 83-2113 E.A. (8th Cir. Nov. 8, 1983), argued (March 15, 1984) and Keeten v. Garrison, 578 F.Supp. 1164 (W.D.N.C.1984), rev'd, 742 F.2d 129 (4th Cir.1984). Whatever the merits of those opinions, they are not controlling authority for this Court.

Because both jurors indicated they would not under any circumstances consider imposing the death penalty, they were properly excluded under Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). See also Boulden v. Holman, 394 U.S. 478, 89 S.Ct. 1138, 22 L.Ed.2d 433 (1969). Their exclusion did not violate petitioner's Sixth Amendment rights to an impartial, community-representative jury. Smith v. Balkcom, 660 F.2d 573, 582-83 (5th Cir. Unit B 1981), cert. denied, 459 U.S. 882, 103 S.Ct. 181, 74 L.Ed.2d 148 (1982); Spinkellink v. Wainwright, 578 F.2d 582, 593-94 (5th

Cir.1978), cert. denied, 440 U.S. 976, 99 S.Ct. 1548, 59 L.Ed.2d.

#### THE SANDSTROM ISSUE

The district court rejected McCleskey's claim that the trial court's instructions to the jury on the issue of intent deprived him of due process by shifting from the prosecution to the defense the burden of proving beyond a reasonable doubt each essential element of the crimes for which he was tried. Such burden-shifting is unconstitutional under *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979).

McCleskey objects to the following portion of the trial court's instruction to the jury:

One section of our law says that the acts of a person of sound mind and discretion are presumed to be the product of the person's will, and a person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts, but both of these presumptions may be rebutted.

8

In its analysis of whether this instruction was unconstitutional under Sandstrom, the district court examined two recent panel opinions of this Circuit, Franklin v. Francis, 720 F.2d 1206 (11th Cir.1983), cert. granted, — U.S. — 104 S.Ct. 2677, 81 L.Ed.2d 873 (1984), and Tucker v. Francis, 723 F.2d 1504 (11th Cir), on pet, for reh'g and reh'g en banc, 723 F.2d 1518 (11th Cir. 1984). Even though the jury instructions in the two cases were identical, Franklin held that the language created a mandatory rebuttable presumption violative of Sandstrom while Tucker held that it created no more than a permissive inference and did not violate Sandstrom. Noting that the challenged portion of the instruction used at McCleskey's trial was "virtually identical" to the corresponding portions of the charges in Franklin and Tucker, the district court elected to follow Tucker as this Court's most recent pronouncement on the issue, and it held that Sandstrom was not violated by the

charge of intent.

Since the district court's decision, the en banc court has heard argument in several cases in an effort to resolve the constitutionality of potentially burden-shifting instructions identical to the one at issue here. Davis v. Zant, 721 F.2d 1478 (11th Cir.1983), on pet. for reh'g and reh'g en banc, 728 F.2d 492 (11th Cir.1984); Drake v. Francis, 727 F.2d 990 (11th Cir.), on pet. for reh'g and for reh'g en banc, 727 F.2d 1003 (11th Cir.1984); Tucker v. Francis, 723 F.2d 1504 (11th Cir.), on pet. for reh'g and reh'g en banc, 723 F.2d 1518 (11th Cir.1984). The United States Supreme Court has heard oral argument in Franklin v. Francis, 53 U.S.L.W. 3373 (U.S. Nov. 20, 1984) [No. 83-1590]. However these cases are decided, for the purpose of this decision, we assume here that the intent instruction in this case violated Sandstrom and proceed to the issue of whether that error was harmless.

The Supreme Court requires that "before a federal constitutional error can be harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967). More recently, the Supreme Court has divided over the issue of whether the doctrine of harmless error is ever applicable to burden-shifting presumptions violative of Sandstrom. Reasoning that "[a]n erroneous presumption on a disputed element of the crime renders irrelevant the evidence on the issue because the jury may have relied upon the presumption rather than upon that evidence," a fourjustice plurality held that one of the two tests for harmless error employed by this Circuit—whether the evidence of guilt is so over-whelming that the erroneous instruction could not have contributed to the jury's verdict-is inappropriate. Connecticut v. Johnson, 460 U.S. 73, 85-87, 103 S.Ct. 969, 976-978, 74 L.Ed.2d 823 (1983). The fifth vote to affirm was added by Justice Stevens, who

concurred on jurisdictional grounds. Id. at 88, 103 S.Ct. at 978 (Stevens, J., concurring in the judgment). Four other justices, however, criticized the plurality for adopting an "automatic reversal" rule for Sandstrom error. Id. at 98, 103 S.Ct. at 983 (Powell, J., dissenting). The Supreme Court has subsequently reviewed another case in which harmless error doctrine was applied to a Sandstrom violation. The Court split evenly once again in affirming without opinion a Sixth Circuit decision holding that "the prejudicial effect of a Sandstrom instruction is largely a function of the defense asserted at trial." Engle v. Koehler, 707 F.2d 241, 246 (6th Cir.1983), aff'd by an equally divided court, — U.S. —, 104 S.Ct. 1673, 80 L.Ed.2d 1 (1984) (per curiam). In Engle, the Sixth Circuit distinguished between Sandstrom violations where the defendant has claimed nonparticipation in the crime and those where the defendant has claimed lack of mens rea, holding that only the latter was so prejudicial as never to constitute harmless error. Id. Until the Supreme Court makes a controlling decision on the harmless error question, we continue to apply the standards propounded in our earlier cases.

Since Sandstrom was decided in 1979, this Circuit has analyzed unconstitutional burden-shifting instructions to determine whether they constituted harmless error. See, e.g., Mason v. Balkcom, 669 F.2d 222, 227 (5th Cir. Unit B 1982). In Lamb v. Jernigan, 683 F.2d 1332 (11th Cir.1982), cert. denied, 460 U.S. 1024, 103 S.Ct. 1276, 75 L.Ed.2d 496 (1983), the Court identified two situations in which an unconstitutional burden-shifting instruction might be harmless. First, an erroneous instruction may have been harmless if the evidence of guilt was so overwhelming that the error could not have contributed to the jury's decision to convict. Lamb, 683 F.2d at 1342; Mason, 669 F.2d at 227. In the case before us, the district court based its finding that the Sandstrom violation was harmless on this ground. This Circuit has decided on several occasions that overwhelming evidence of guilt renders a Sandstrom violation harmless. See Jarrell v. Balkcom, 735 F.2d 1242, 1257 (11th Cir.1984); Brooks v. Francis, 716 F.2d 780, 793-94 (11th Cir.1983), on pet. for reh'g and for reh'g en banc, 728 F.2d 1358 (11th Cir.1984); Spencer v. Zant, 715 F.2d 1562, 1578 (11th Cir.1983), on pet. for reh'g and for reh'g en banc, 729 F.2d 1293 (11th Cir.1984).

Second, the erroneous instruction may be harmless where the instruction shifts the burden on an element that is not at issue at trial. Lamb, 683 F.2d at 1342. This Circuit has adopted this rationale to find a Sandstrom violation harmless. See Drake v. Francis, 727 F.2d 990, 999 (11th Cir.), on pet. for reh'g and for reh'g en banc, 727 F.2d 1003 (11th Cir.1984); Collins v. Francis, 728 F.2d 1322, 1330-31 (11th Cir.1984), pet for reh'g en banc denied, 734 F.2d 1481 (11th Cir.1984). There is some indication that even the plurality in Connecticut v. Johnson would endorse this type of harmless error in limited circumstances:

[A] Sandstrom error may be harmless if the defendant conceded the issue of intent. . . . In presenting a defense such as alibi, insanity, or self-defense, a defendant may in some cases admit that the act alleged by the prosecution was intentional, thereby sufficiently reducing the likelihood that the jury applied the erroneous instruction as to permit the appellate court to consider the error harmless.

460 U.S. at 87, 103 S.Ct. at 978 (citations omitted).

Our review of the record reveals that the Sandstrom violation in this case is rendered harmless error under this second test. Before discussing whether intent was at issue in McCleskey's trial, however, we note that intent is an essential element of the crime with which he was charged. Georgia law provides three essential elements to the offense of malice murder: (1) a homicide; (2) malice aforethought; and (3) unlawfulness. Lamb v. Jernigan, 683 F.2d at 1336. The "malice" element means the in-

tent to kill in the absence of provocation. *Id.* The erroneous instruction on intent, therefore, involved an essential element of the criminal offense charged, and the state was required to prove the existence of that element beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1072, 25 L.Ed.2d 368 (1970). The question therefore becomes whether McCleskey conceded the element of intent by presenting a defense that admits that the act alleged was intentional.

Of course, a defendant in a criminal trial may rely entirely on the presumption of innocence and the State's burden of proving every element of the crime beyond a reasonable doubt. Connecticut v. Johnson, 460 U.S. at 87 n. 16, 103 S.Ct. at 978 n.16. In such a case, determining whether a defendant had conceded the issue of intent might well be impossible. The record reveals, however, that McCleskey chose not to take that course. Rather, he took the stand at trial and testified that he was not a participant in the Dixie Furniture Store robbery which resulted in the killing of Officer Schlatt. The end of McCleskey's testimony on direct examination summarizes his alibi defense:

- Q. Were you at the Dixie Furniture Store that day?
- A. No.
- Q. Did you shoot anyone?
- A. No, I didn't.
- Q. Is everything you have said the truth?
- A. Positive.

In closing argument, McCleskey's attorney again stressed his client's alibi defense. He concentrated on undermining the credibility of the eyewitness identifications that pinpointed McCleskey as the triggerman and on questioning the motive of the other robbery participants who had testified that McCleskey had fired the fatal shots. McCleskey's attorney emphasized that

if Mr. McClesky was in the front of the store and Mr. McCleskey had the silver gun and if the silver gun killed the police officer, then he would be guilty. But that is not the circumstances that have been proven.

Although McCleskey's attorney's arguments were consistent with the alibi testimony offered by McCleskey himself, the jury chose to disbelieve that testimony and rely instead on the testimony of eyewitnesses and the other par-

ticipants in the robbery.

We therefore hold that in the course of asserting his alibi defense McCleskey effectively conceded the issue of intent, thereby rendering the Sandstrom violation harmless beyond a reasonable doubt. In so holding, we do not imply that whenever a defendant raises a defense of alibi a Sandstrom violation on an intent or malice instruction is automatically rendered harmless error. Nor do we suggest that defendant must specifically argue that intent did not exist in order for the issue of intent to remain before the jury. But where the State has presented overwhelming evidence of an intentional killing and where the defendant raises a defense of nonparticipation in the crime rather than lack of mens rea, a Sandstrom violation on an intent instruction such as the one at issue here is harmless beyond a reasonable doubt. See Collins v. Francis, 728 F.2d at 1331; Engle v. Koehler, 707 F.2d at 246.

In this case the officer entered and made it almost to the middle of the store before he was shot twice with a .38 caliber Rossi revolver. The circumstances of this shooting, coupled with McCleskey's decision to rely on an alibi defense, elevate to mere speculation any scenario that would create a reasonable doubt on the issue of intent. The district court properly denied habeas corpus relief on this issue.

#### CONCLUSION

The judgment of the district court in granting the petition for writ of habeas corpus is reversed and the petition is hereby denied.

REVERSED and RENDERED.

TJOFLAT, Circuit Judge, concurring:

I concur in the court's opinion, though I would approach the question of the constitutional application of the death penalty in Georgia somewhat differently. I would begin with the established proposition that Georgia's capital sentencing model is facially constitutional. It contains the safeguards necessary to prevent arbitrary and capricious decision making, including decisions motivated by the race of the defendant or the victim. These safeguards are present in every stage of a capital murder prosecution in Georgia, from the grand jury indictment through the execution of the death sentence. Some of these safeguards are worth repeating.

At the indictment stage, the accused can insist that the State impanel a grand jury that represents a fair cross section of the community, as required by the sixth and fourteenth amendments, and that the State not deny a racial group, in violation of the equal protection clause of the fourteenth amendment, the right to participate as jurors. In Georgia this means that a representative por-

tion of blacks will be on the grand jury.

The same safeguards come into play in the selection of the accused's petit jury. In addition, the accused can challenge for cause any venireman found to harbor a racial bias against the accused or his victim. The accused can peremptorily excuse jurors suspected of such bias and, at the same time, prevent the prosecutor from exercising his peremptory challenges in a way that systematically excludes a particular class of persons, such as blacks, from jury service. See, e.g., Willis v. Zant, 720

F.2d 1212 (11th Cir.1983), cert. denied, — U.S.—, 104 S.Ct. 3548, 82 L.Ed. 851 (1984).

If the sentencer is the jury, as it is in Georgia (the trial judge being bound by the jury's recommendation) it can be instructed to put aside racial considerations in reaching its sentencing recommendation. If the jury recommends the death sentence, the accused, on direct appeal to the Georgia Supreme Court, can challenge his sentence on racial grounds as an independent assignment of error or in the context of proportionality review. And, if the court affirms his death sentence, he can renew his challenge in a petition for rehearing or by way of collateral attack.

In assessing the constitutional validity of Georgia's capital sentencing scheme, one could argue that the role of the federal courts—the Supreme Court on certiorari from the Georgia Supreme Court and the entire federal judicial system in habeas corpus review—should be considered. For they provide still another layer of safeguards against the arbitrary and capricious imposition

of the death penalty.

Petitioner, in attacking his conviction and death sentence, makes no claim that either was motivated by a racial bias in any stage of his criminal prosecution. His claim stems solely from what has transpired in other homicide prosecutions. To the extent that his data consists of cases in which the defendant's conviction and sentence -whether a sentence to life imprisonment or death-is constitutionally unassailable, the data, I would hold, indicates no invidious racial discrimination as a matter of law. To the extent that the data consists of convictions and/or sentences that are constitutionally infirm, the data is irrelevant. In summary, petitioner's data, which shows nothing more than disproportionate sentencing results, is not probative of a racially discriminatory motive on the part of any of the participants in Georgia's death penalty sentencing model—either in petitioner's or any other case.

VANCE, Circuit Judge, concurring:

Although I concur in Judge Roney's opinion, I am troubled by its assertion that there is "little difference in the proof that might be required to prevail" under either eighth amendment or fourteenth amendment equal protection claims of the kind presented here 1 According to Furman, an eighth amendment inquiry centers on the general results of capital sentencing systems, and condemns those governed by such unpredictable factors as chance, caprice or whim. An equal protection inquiry is very different. It centers not on systemic irrationality, but rather the independent evil of intentional, invidious discrimination against given individuals.

I am conscious of the dicta in the various Furman opinions which note with disapproval the possibility that racial discrimination was a factor in the application of the death penalty under the Georgia and Texas statutes then in effect. To my mind, however, such dicta merely indicate the possibility that a system that permits the exercise of standardless discretion not only may be capricious, but may give play to discriminatory motives which violate equal protection standards as well. Whether a given set of facts make out an eighth amendment claim of systemic irrationality under Furman is, therefore, a question entirely independent of whether those facts establish deliberate discrimination violative of the equal protection clause.

I am able to concur because in neither the case before us nor in any of the others presently pending would the difference influence the outcome. As Judge Roney points out, petitioner's statistics are insufficient to establish intentional discrimination in the capital sentence imposed in his case. As to the eighth amendment, I doubt that a claim of arbitrariness or caprice is even presented, since petitioner's case is entirely devoted to proving that the

<sup>&</sup>lt;sup>1</sup> I have not addressed the due process analysis employed by the district court because the petitioner did not rely on it in his brief.

death penalty is being applied in an altogether explica-

ble-albeit impermissible-fashion.

Claims such as that of petitioner are now presented with such regularity that we may reasonably hope for guidance from the Supreme Court by the time my expressed concerns are outcome determinative in a given case.

## KRAVITCH, Circuit Judge, concurring:

I concur in the majority opinion except as to the *Giglio* issue. In my view, for reasons stated in Chief Judge Godbold's dissent, the facts surrounding Evans' testimony did constitute a *Giglio* violation. I agree with the majority, however, that any error was harmless beyond a reasonable doubt.

I also join Judge Anderson's special concurrence on the "Constitutional Application of the Georgia Death Penalty."

R. LANIER ANDERSON, III, Circuit Judge, concurring with whom KRAVITCH, Circuit Judge, joins as to the constitutional application of the Georgia Death Statute:

I join Judge Roney's opinion for the majority, and write separately only to emphasize, with respect to the Part entitled "Constitutional Application of Georgia's Death Penalty," that death is different in kind from all other criminal sanctions, Woodson v. North Carolina, 428 U.S. 280, 305, 96 S.Ct. 2978, 2991, 49 L.Ed. 2d 944 (1976). Thus, the proof of racial motivation required in a death case, whether pursuant to an Eighth Amendment theory or an equal protection theory, presumably would be less strict than that required in civil cases or in the criminal justice system generally. Constitutional adjudication would tolerate less risk that a death sentence was influenced by race. The Supreme Court's Eighth Amendment jurisprudence has established a constitutional super-

vision over the conduct of state death penalty systems which is more exacting than that with respect to the criminal justice system generally Woodson v. North Carolina, id. at 305, 96 S.Ct. at 2991 ("Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment."). There is no need in this case, however, to reach out and try to define more precisely what evidentiary showing would be required. Judge Roney's opinion demonstrates with clarity why the evidentiary showing in this case is insufficient.

GODBOLD, Chief Judge, dissenting in part, and concurring in part, with whom JOHNSON, HATCHETT and CLARK, Circuit Judges, join as to the dissent on the *Giglio* issue \*:

At the merits trial Evans, who had been incarcerated with McCleskey, testified that McCleskey admitted to him that he shot the policeman and acknowledged that he wore makeup to disguise himself during the robbery. Evans also testified that he had pending against him a [federal] escape charge, that he had not asked the prosecutor to "fix" this charge, and that the prosecutor had not promised him anything to testify.

At the state habeas hearing the following transpired:

The Court: Mr. Evans, let me ask you a question. At the time that you testified in Mr. McCleskey's trial, had you been promised anything in exchange for your testimony?

The witness: No, I wasn't. I wasn't promised nothing about—I wasn't promised nothing by the D.A. But the Detective told me that he would—he said he was going to do it himself, speak a word for me. That was what the Detective told me.

<sup>\*</sup> I dissent on only the Giglio issue. I concur in Judge Roney's opinion on all other issues.

By Mr. Stroup:

Q: The Detective told you that he would speak a word for you?

A: Yeah.

Q: That was Detective Dorsey?

A: Yeah.

State Habeas Transcript at 122.

The district court granted habeas relief to McCleskey under Giglio v. U.S., 405 U.S. 150, 92 S.Ct. 763, L.Ed.2d 104 (1972). At the threshold the district court pointed out that Giglio applies not only to "traditional deals" made by the prosecutor in exchange for testimony but also to "any promises or understandings made by any member of the prosecutorial team, which includes police investigators." 580 F.Supp. at 380. The court then made these subsidiary findings: (1) that Evans's testimony was highly damaging; (2) that "the jury was clearly left with the impression that Evans was unconcerned about any charges which were pending against him and that no promises had been made which would affect his credibility," id. at 381; (3) that at petitioner's state habeas hearings Evans testified "that one of the detectives investigating the case had promised to speak to federal authorities on his behalf," id.; (4) that the escape charges pending against Evans were dropped subsequent to Mc-Cleskey's trial.

The en banc court seems to me to err on several grounds. It blurs the proper application of *Giglio* by focusing sharply on the word "promise." The proper inquiry is not limited to formal contracts, unilateral or bilateral, or words of contract law, but "to ensure that the jury knew the facts that might motivate a witness in giving testimony." The v. Kemp, 715 F.2d 1459, 1467 (11th Cir.1983). Giglio reaches the informal understanding as well as the formal. The point is, even if the deal-

ings are informal, can the witness reasonably view the government's undertaking as offering him a benefit and can a juror knowing of it reasonably view it as motivating the witness in giving testimony? The verbal undertaking made in this instance by an investigating state officer, who is a member of the prosecution team, that he will "put in a word for him" on his pending federal charge was an undertaking that a jury was entitled to know about.

Second, the en banc court finds the benefit too marginal. Of course, the possible benefit to a potential witness can be so minimal that a court could find as a matter of law no *Giglio* violation occurred. A trivial offer is not enough. The subject matter of the offer to Evans was substantial, or at least a jury was entitled to consider it so. After McCleskey was tried and convicted, the federal charge

was dropped.

Third, the court concludes there was no reasonable likelihood that Evans's testimony affected the judgment of the jury. Co-defendant Wright was the only eyewitness. He was an accomplice, thus his testimony, unless corroborated, was insufficient to establish that McCleskey was the triggerman. The en banc court recognizes this problem but avoids it by holding that Wright's testimony was corroborated by "McCleskey's own confession." This could refer to either of two admissions of guilt by McCleskey. He "confessed" to Wright, but Wright's testimony on this subject could not be used to corroborate Wright's otherwise insufficient accomplice testimony. Testimony of an accomplice cannot be corroborated by the accomplice's own testimony. The other "confession" was made to Evans and testified to by Evans. Thus Evans is not a minor or incidental witness. Evans' testimony, describing what Mc-Cleskey "confessed" to him, is the corroboration for the testimony of the only eyewitness, Wright. And that evewitness gave the only direct evidence that McCleskey killed the officer.

The district court properly granted the writ on Giglio grounds. Its judgment should be affirmed.

JOHNSON, Circuit Judge, dissenting in part and concurring in part, with whom HATCHETT and CLARK, Circuit Judges join:

Warren McCleskey has presented convincing evidence to substantiate his claim that Georgia has administered its death penalty in a way that discriminates on the basis of race. The Baldus Study, characterized as "far and away the most complete and thorough analysis of sentencing" ever carried out,1 demonstrates that in Georgia a person who kills a white victim has a higher risk of receiving the death penalty than a person who kills a black victim. Race alone can explain part of this higher risk. The majority concludes that the evidence "confirms rather than condemns the system" and that it fails to support a constitutional challenge. I disagree. In my opinion, this disturbing evidence can and does support a constitutional claim under the Eighth Amendment. In holding otherwise, the majority commits two critical errors: it requires McCleskey to prove that the State intended to discriminate against him personally and it underestimates what his evidence actually did prove. I will address each of these concerns before commenting briefly on the validity of the Baldus Study and addressing the other issues in this case.

# I. THE EIGHTH AMENDMENT AND RACIAL DIS-CRIMINATION IN THE ADMINISTRATION OF THE DEATH PENALTY

McCleskey claims that Georgia administers the death penalty in a way that discriminates on the basis of race. The district court opinion treated this argument as one arising under the Fourteenth Amendment <sup>2</sup> and ex-

<sup>&</sup>lt;sup>1</sup> This was the description given at trial by Dr. Richard Berk, member of a panel of the National Academy of Sciences charged with reviewing all previous research on criminal sentencing issues in order to set standards for the conduct of such research.

<sup>&</sup>lt;sup>2</sup> The district court felt bound by precedent to analyze the claim under the equal protection clause, but expressed the opinion that it

plicitly rejected the petitioner's claim that he could raise the argument under the Eighth Amendment, as well. The majority reviews each of these possibilities and concludes that there is little difference in the proof necessary to prevail under any of the theories: whatever the constitutional source of the challenge, a petitioner must show a disparate impact great enough to compel the conclusion that purposeful discrimination permeates the system. These positions reflect a misunderstanding of the nature of an Eighth Amendment claim in the death penalty context: the Eighth Amendment prohibits the racially discriminatory application of the death penalty and McCleskey does not have to prove intent to discriminate in order to show that the death penalty is being applied arbitrarily and capriciously.

# A. The Viability of an Eighth Amendment Challenge

As the majority recognizes, the fact that a death penalty statute is facially valid does not foreclose an Eighth Amendment challenge based on the systemwide application of that statute. The district court most certainly erred on this issue. Applying the death penalty in a racially discriminatory manner violates the Eighth Amendment. Several members of the majority in Furman v. Georgia, 408 U.S. 238, 245-57, 310, 364-65, 92 S.Ct. 2726, 2729-36, 2796, 2790-91, 33 L.Ed.2d 346 (1972) (concurring opinions of Douglas, Stewart, Marshall, JJ.), relied in part on the disproportionate impact of the death penalty on racial minorities in concluding that the death penalty as then administered constituted arbitrary and capricious punishment.

When decisionmakers look to the race of a victim, a factor completely unrelated to the proper concerns of the

might best be understood as a due process claim. It does not appear that a different constitutional basis for the claim would have affected the district court's conclusions.

sentencing process enters into determining the sentence. Reliance on the race of the victim means that the sentence is founded in part on a morally and constitutionally repugnant judgment regarding the relative low value of the lives of black victims. Cf. Zant v. Stephens, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983) (listing race of defendant as a factor "constitutionally impermissible or totally irrelevant to the sentencing process"). There is no legitimate basis in reason for relying on race in the sentencing process. Because the use of race is both irrelevant to sentencing and impermissible, sentencing determined in part by race is arbitrary and capricious and therefore a violation of the Eighth Amendment. See Furman v. Georgia, 408 U.S. 238, 256, 92 S.Ct. 2726, 2735, 33 L.Ed.2d 346 (1972) (Douglas, J., concurring) ("the high service rendered by the 'cruel and unusual' punishment clause of the Eighth Amendment is to require judges to see to it that general laws are not applied sparsely, selectively, and spottily to unpopular groups").

## B. The Eighth Amendment and Proof of Discriminatory Intent

The central concerns of the Eighth Amendment deal more with decisionmaking processes and groups of cases than with individual decisions or cases. In a phrase repeated throughout its later cases, the Supreme Court in Gregg v. Georgia, 428 U.S. 153, 195 n.46, 96 S.Ct. 2909, 2935 n.46, 49 L.Ed.2d 859 (1976) (plurality opinion), stated that a "pattern of arbitrary and capricious sentencing" would violate the Eighth Amendment. In fact, the Court has consistently adopted a systematic perspective on the death penalty, looking to the operation of a state's entire sentencing structure in determining whether it inflicted sentences in violation of the Eighth Amendment. See, e.g., Eddings v. Oklahoma, 455 U.S. 104, 112, 102 S.Ct. 869, 875, 71 L.Ed.2d 1 (1982) (capital punishment must be imposed "fairly, and with reasonable con-

sistency, or not at all"); Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980) ("[I]f a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty.").

Without this systemic perspective, review of sentencing would be extremely limited, for the very idea of arbitrary and capricious sentencing takes on its fullest meaning in a comparative context. A non-arbitrary sentencing structure must provide some meaninful way of distinguishing between those who receive the death sentence and those who do not. Godfrey v. Georgia, 446 U.S. 420, 433, 100 S.Ct. 1759, 1767, 64 L.Ed.2d 398 (1980); Furman v. Georgia, 408 U.S. 238, 313, 92 S.Ct. 2726, 2764, 33 L.Ed. 2d 346 (1972) (White J., concurring). Appellate proportionality review is not needed in every case but consistency is still indispensable to a constitutional sentencing system.3 The import of any single sentencing decision depends less on the intent of the decisionmaker than on the outcome in comparable cases. Effects evidence is well suited to this type of review.

This emphasis on the outcomes produced by the entire system springs from the State's special duty to insure fairness with regard to something as serious as a death sentence. See Zant v. Stephens, 462 U.S. 862, 103 S.Ct. 2733, 2741, 77 L.Ed.2d 235 (1983); Lockett v. Ohio, 438 U.S. 586, 605, 98 S.Ct. 2954, 2965, 57 L.Ed.2d 973 (1978); Woodson v. North Carolina, 428 U.S. 280, 305,

<sup>&</sup>lt;sup>3</sup> The Supreme Court in *Pulley v. Harris*, — U.S. —, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984), emphasized the importance of factors other than appellate proportionality review that would control jury discretion and assure that sentences would not fall into an arbitrary pattern. The decision in *Pulley* deemphasizes the importance of evidence of arbitrariness in individual cases and looks exclusively to "systemic" arbitrariness. The case further underscores this court's responsibility to be alert to claims, such as the one McCleskey makes, that allege more than disproportionality in a single sentence.

96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (1976) (plurality opinion). Monitoring patterns of sentences offers an especially effective way to detect breaches of that duty. Indeed, because the death penalty retains the need for discretion to make individualized judgments while at the same time heightening the need for fairness and consistency, Eddings v. Oklahoma, supra, 455 U.S. at 110-12, 102 S.Ct. at 874-75, patterns of decisions may often be the only acceptable basis of review. Discretion hinders inquiry into intent: if unfairness and inconsistency are to be detected even when they are not overwhelming or obvious, effects evidence must be relied upon.

Insistence on systemwide objective standards to guide sentencing reliably prevents aberrant decisions without having to probe the intentions of juries or other decision-makers. Gregg v. Georgia, supra, 428 U.S. at 198, 96 S.Ct. at 2936; Woodson v. North Carolina, supra, 428 U.S. at 303, 96 S.Ct. at 2990 (objective standards necessary to "make rationally reviewable the process for imposing the death penalty"). The need for the State to constrain the discretion of juries in the death penalty area is unusual by comparison to other areas of the law. It demonstrates the need to rely on systemic controls as a way to reconcile discretion and consistency; the same combined objectives argue for the use of effects evidence rather than waiting for evidence of improper motives in specific cases.

Objective control and review of sentencing structures is carried so far that a jury or other decisionmaker may be presumed to have intended a non-arbitrary result when the outcome is non-arbitrary by an objective standard; the law, in short, looks to the result rather than the actual motives.<sup>4</sup> In Westbrook v. Zant, 704 F.2d 1487,

<sup>&</sup>lt;sup>4</sup> Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), and other cases demonstrate that the actual deliberations of the sentencer are relevant under the Eighth Amendment, for mitigating factors must have their proper place in all deliberations. But the sufficiency of intent in proving an Eighth Amendment violation does not imply the necessity of intent for all such claims.

1504 (11th Cir.1983), this Court held that, even though a judge might not properly instruct a sentencing jury regarding the proper definition of aggravating circumstances, the "uncontrolled discretion of an uninstructed jury" can be cured by review in the Georgia Supreme Court. The state court must find that the record shows the presence of statutory aggravating factors that a jury could have relied upon. If the factors are present in the record it does not matter that the jury may have misunderstood the role of aggravating circumstances. If the State can unintentionally succeed in preventing arbitrary and capricious sentencing, it would seem that the State can also fail in its duty even though none of the relevant decisionmakers intend such a failure.

Other Eleventh Circuit cases mention that habeas corpus petitioners must prove intent to discriminate racially against them personally in the application of the death sentence. But these cases all either treat the claim as though it arose under the Fourteenth Amendment alone or rely on Smith or one of its successors. See Sullivan v. Wainwright, 721 F.2d 316 (11th Cir. 1983); Adams v. Wainwright, 709 F.2d 1443 (11th Cir. 1983). Of course, to the extent these cases attempt to foreclose Eighth Amendment challenges of this sort or require proof of particularized intent to discriminate, they are inconsistent with the Supreme Court's inter-

<sup>&</sup>lt;sup>5</sup> The only Fifth or Eleventh Circuit cases touching on the issue of discriminatory intent under the Eighth Amendment appear to be inconsistent with the Supreme Court's approach and therefore wrongly decided. The court in Smith v. Balkcom, 660 F.2d 573, 584 (5th Cir. Unit B 1981), modified, 671 F.2d 858 (5th Cir. 1982), stated that Eighth Amendment challenges based on race require a showing of intent, but the court reached this conclusion because it wrongly believed that Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978), compelled such a result. The Spinkellink court never reached the question of intent, holding that Supreme Court precedent foreclosed all Eighth Amendment challenges except for extreme cases where the sentence is shockingly disproportionate to the crime. 578 F.2d at 606 & n. 28. See supra note 3. The Smith court cites to a portion of the Spinkellink opinion dealing with equal protection arguments. 578 F.2d at 614 n. 40. Neither of the cases took note of the most pertinent Eighth Amendment precedents decided by the Supreme Court.

In sum, the Supreme Court's systemic and objective perspective in the review and control of death sentencing indicates that a pattern of death sentences skewed by race alone will support a claim of arbitrary and capricious sentencing in violation of the Eighth Amendment. See Furman v. Georgia, 408 U.S. 238, 253, 92 S.Ct. 2726, 2733, 33 L.Ed.2d 346 (1972) (Douglas, J., concurring) ("We cannot say that these defendants were sentenced to death because they were black. Yet our task is not restricted to an effort to divine what motives impelled these death penalties."). The majority's holding on this issue conflicts with every other constitutional limit on the death penalty. After today, in this Circuit arbitrariness based on race will be more difficult to eradicate than any other sort of arbitrariness in the sentencing system.

# II. PROVING DISCRIMINATORY EFFECT AND INTENT WITH THE BALDUS STUDY

The statistical study conducted by Dr. Baldus provides the best possible evidence of racially disparate impact. It began with a single unexplained fact: killers of white victims in Georgia over the last decade have received the death penalty eleven times more often than killers of black victims. It then employed several statistical techniques, including regression analysis, to isolate the amount of that disparity attributable to both racial and non-racial factors. Each of the techniques yielded a statistically significant racial influence of at least six percent; in other words, they all showed that the pattern of sentencing could only be explained by assuming that the

pretation of the Eighth Amendment. Cf. Gates v. Collier, 501 F.2d 1291, 1300-01 (5th Cir. 1974) (prohibition against cruel and urusual punishment "is not limited to specific acts directed at selected individuals").

<sup>&</sup>lt;sup>6</sup> Among those who were eligible for the death penalty, eleven percent of the killers of white victims received the death penalty, while one percent of the killers of black victims received it.

race of the victim made all defendants convicted of killing white victims at least six percent more likely to receive the death penalty. Other factors <sup>7</sup> such as the number of aggravating circumstances or the occupation of the victim could account for some of the eleven-to-one differential, but the race of the victim remained one of the strongest influences.

Assuming that the study actually proves what it claims to prove, an assumption the majority claims to make, the evidence undoubtedly shows a disparate impact. Regression analysis has the great advantage of showing that a perceived racial effect is an actual racial effect because it controls for the influence of non-racial factors. By screening out non-racial explanations for certain outcomes, regression analysis offers a type of effects evidence that approaches evidence of intent, no matter what level of disparity is shown. For example, the statistics in this case show that a certain number of death penalties were probably imposed because of race, without ever inquiring directly into the motives of jurors or prosecutors.

Regression analysis is becoming a common method of proving discriminatory effect in employment discrimination suits. In fact, the Baldus Study shows effects at least as dramatic and convincing as those in statistical studies offered in the past. Cf. Segar v. Smith, 738 F.2d 1249 (D.C.Cir.1984); Wade v. Mississippi Cooperative Extension Service, 528 F.2d 508 (5th Cir.1976). Nothing more should be necessary to prove that Georgia is applying its death penalty statute in a way that arbitrarily and capriciously relies on an illegitimate factor—race.8

<sup>&</sup>lt;sup>7</sup> In one of the largest of these models, the one focused on by the district court and the majority, the statisticians used 230 different independent variables (possible influences on the pattern of sentencing), including several different aggravating and many possible mitigating factors.

<sup>&</sup>lt;sup>8</sup> See part I, supra. Of course, proof of any significant racial effects is enough under the Eighth Amendment, for a requirement of proving large or pervasive effects is tantamount to proof of intent.

Even if proof of discriminatory intent were necessary to make out a constitutional challenge, under any reasonable definition of intent the Baldus Study provides sufficient proof. The majority ignores the fact that McCleskey has shown discriminatory intent at work in the sentencing system even though he has not pointed to any specific act or actor responsible for discriminating against him in

particular.9

The law recognizes that even though intentional discrimination will be difficult to detect in some situations, its workings are still pernicious and real. Rose v. Mitchell, 443 U.S. 545, 559, 99 S.Ct. 2993, 3001, 61 L.Ed.2d 739 (1979). Under some circumstances, therefore, proof of discriminatory effect will be an important first step in proving intent, Crawford v. Board of Education, 458 U.S. 527, 102 S.Ct. 3211, 73 L.Ed.2d 948 (1982), and may be the best available proof of intent. Washington v. Davis, 426 U.S. 229, 241-42, 96 S.Ct. 2040, 2048-49, 48 L.Ed.2d 597 (1976); United States v. Texas Educational Agency, 579 F.2d 910, 913-14 & nn.5-7 (5th Cir.1978), cert. denied, 443 U.S. 915, 99 S.Ct. 3106, 61 L.Ed.2d 879 (1979).

For instance, proof of intentional discrimination in the selection of jurors has traditionally depended on showing racial effects. See Castaneda v. Partida, 430 U.S. 482, 97 S.Ct. 1272, 51 L.Ed.2d 498 (1977); Turner v. Fouche, 396 U.S. 346, 90 S.Ct. 532, 24 L.Ed.2d 532 (1970); Gibson v. Zant, 705 F.2d 1543 (11th Cir.1983). This is because the discretion allowed to jury commissioners, although legitimate, could easily be used to mask conscious or unconscious racial discrimination. The Supreme Court has recognized that the presence of this sort of discretion calls for indirect methods of proof. Washington v. Davis, 426 U.S. 229, 241-42, 96 S.Ct. 2040, 2048-

<sup>&</sup>lt;sup>9</sup> The same factors leading to the conclusion that an Eighth Amendment claim does not require proof of intent militate even more strongly against using too restrictive an understanding of intent.

49, 48 L.Ed.2d 597 (1976); Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252, 266 n.13, 97 S.Ct. 555, 564 n.13, 50 L.Ed.2d 450 (1977).

This Court has confronted the same problem in an analogous setting. In Searcy v. Williams, 656 F.2d 1003, 1008-09 (5th Cir.1981), aff'd sub nom. Hightower v. Searcy, 455 U.S. 984, 102 S.Ct. 1605, 71 L.Ed.2d 844 (1982), the court overturned a facially valid procedure for selecting school board members because the selections fell into an overwhelming pattern of racial imbalance. The decision rested in part on the discretion inherent in the selection process: "The challenged application of the statute often involves discretion or subjective criteria utilized at a crucial point in the decision-making process."

The same concerns at work in the jury discrimination context operate with equal force in the death penalty context. The prosecutor has considerable discretion and the jury has bounded but irreducible discretion. Defendants cannot realistically hope to find direct evidence of discriminatory intent. This is precisely the situation envisioned in Arlington Heights, where the Court pointed out that "[s]ometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face. . . . The evidentiary inquiry is then relatively easy." 429 U.S. at 266, 97 S.Ct. at 564.

As a result, evidence of discriminatory effects presented in the Baldus Study, like evidence of racial disparities in the composition of jury pools 10 and in other

<sup>10</sup> The majority distinguishes the jury discrimination cases on tenuous grounds, stating that the disparity between the number of minority persons on the jury venire and the number of such persons in the population is an "actual disparity," while the racial influence in this case is not. If actual disparities are to be considered, then the court should employ the actual (and overwhelming) eleven-to-one differential between white victim cases and black victim cases. The percentage figures presented by the Baldus Study are really more reliable than "actual" disparities because they control for possible non-racial factors.

contexts, 11 excludes every reasonable inference other than discriminatory intent at work in the system. This Circuit has acknowledged on several occasions that evidence of this sort could support a constitutional challenge. Adams v. Wainwright, 709 F.2d 1443, 1449 (11th Cir.1983); Smith v. Balkcom, 660 F.2d 573 (5th Cir. Unit B 1981), modified in part, 671 F.2d 858, cert. denied, 459 U.S. 882, 103 S.Ct. 181, 74 L.Ed.2d 148 (1982); Spinkellink, supra, at 614.

A petitioner need not exclude all inferences other than discriminatory intent in his or her particular case. Yet the majority improperly stresses this particularity requirement and interprets it so as to close a door left open by the Supreme Court. It would be nearly impossible to prove through evidence of a system's usual effects that intent must have been a factor in any one case; effects evidence, in this context, necessarily deals with many cases at once. Every jury discrimination charge would be stillborn if the defendant had to prove by direct evidence that the jury commissioners intended to deprive him or her of the right to a jury composed of a fair cross-section of the community. Requiring proof of discrimina-

<sup>&</sup>lt;sup>11</sup> United States v. Texas Educational Agency, 579 F.2d 910 (5th Cir. 1978), cert. denied, 443 U.S. 915, 99 S.Ct. 3106, 61 L.Ed.2d 879 (1979), involving a segregated school system, provides another example of effects evidence as applied to an entire decisionmaking system.

<sup>&</sup>lt;sup>12</sup> The particularity requirement has appeared sporadically in this Court's decisions prior to this time, although it was not a part of the original observation about this sort of statistical evidence in *Smith v. Balkcom*, *supra*.

<sup>13</sup> The dissenting opinion of Justice Powell in Stephens v. Kemp, — U.S. —, 104 S.Ct. 562, 78 L.Ed.2d 370, 372 (1984), does not undermine the clear import of cases such as the jury discrimination cases. For one thing, a dissent from a summary order does not have the precedential weight of a fully considered opinion of the Court. For another, the Stephens dissent considered the Baldus Study as an equal protection argument only and did not address what might be necessary to prove an Eighth Amendment violation.

tion in a particular case is especially inappropriate with regard to an Eighth Amendment claim, for even under the majority's description of the proof necessary to sustain an Eighth Amendment challenge, race operating in a pervasive manner "in the system" will suffice.

The majority, after sowing doubts of this sort, nevertheless concedes that despite the particularity requirement, evidence of the system's effects could be strong enough to demonstrate intent and purpose. Its subsequent efforts to weaken the implications to be drawn from the Baldus Study are uniformly unsuccessful.

For example, the majority takes comfort in the fact that the level of aggravation powerfully influences the sentencing decision in Georgia. Yet this fact alone does not reveal a "rational" system at work. The statistics not only show that the number of aggravating factors is a significant influence; they also point to the race of the victim as a factor of considerable influence. Where racial discrimination contributes to an official decision, the decision is unconstitutional even though discrimination was not the primary motive. Personnel Administrator v. Feeney, 442 U.S. 256, 279, 99 S.Ct. 2282, 2296, 60 L.Ed.2d 870 (1979).

Neither can the racial impact be explained away by the need for discretion in the administration of the death penalty or by any "presumption that the statute is operating in a constitutional manner." The discretion necessary to the administration of the death penalty does not

<sup>14</sup> While I agree with Judge Anderson's observation that "the proof of racial motivation required in a death case . . . would be less strict than that required in civil cases or in the criminal justice system generally," I find it inconsistent with his acceptance of the majority outcome. The "exacting" constitutional supervision over the death penalty established by the Supreme Court compels the conclusion that discriminatory effects can support an Eighth Amendment challenge. Furthermore, the majority's evaluation of the evidence in this case is, if anything, more strict than in other contexts. See note 10, supra.

include the discretion to consider race: the jury may consider any proper aggravating factors, but it may not consider the race of the victim as an aggravating factor. Zant v. Stephens, 462 U.S. 862, 103 S.Ct. 2733, 2741, 77 L.Ed.2d 235 (1983). And a statute deserves a presumption of constitutionality only where there is real uncertainty as to whether race influences its application. Evidence such as the Baldus Study, showing that the pattern of sentences can only be explained by assuming a significant racial influence, overcomes whatever presumption exists.

The majority's effort to discount the importance of the "liberation hypothesis" also fails. In support of his contention that juries were more inclined to rely on race when other factors did not militate toward one outcome or another. Dr. Baldus noted that a more pronounced racial influence appeared in cases of medium aggravation (20 percent) than in all cases combined (6 percent). The majority states that racial impact in a subset of cases cannot provide the basis for a systemwide challenge. However, there is absolutely no justification for such a claim. The fact that a system mishandles a sizeable subset of cases is persuasive evidence that the entire system operates improperly. Cf. Connecticut v. Teal, 457 U.S. 440, 102 S.Ct. 2525, 73 L.Ed.2d 130 (1984) (written test discriminates against some employees); Lewis v. City of New Orleans, 415 U.S. 130, 94 S.Ct. 970, 39 L.Ed.2d 214 (1974) (statute infringing on First Amendment interests in some cases). A system can be applied arbitrarily and capriciously even if it resolves the obvious cases in a rational manner. Admittedly, the lack of a precise definition of medium aggravation cases could lead to either an

<sup>15</sup> The racial influence operates in the average case and is therefore probably at work in any single case. The majority misconstrues the nature of regression analysis when it says that the coefficient of the race-of-the-victim factor represents the percentage of cases in which race could have been a factor. That coefficient represents the influence of race across all the cases.

overstatement or understatement of the racial influence. Accepting, however, that the racial factor is accentuated to some degree in the middle range of cases, 16 the evidence of racial impact must be taken all the more seriously.

Finally, the majority places undue reliance on several recent Supreme Court cases. It argues that Ford v. Strickland, — U.S. —, 104 S.Ct. 3498, 82 L.Ed.2d 911 (1984), Adams v. Wainwright, — U.S. — 104 S.Ct. 2183, 80 L.Ed.2d 809 (1984), and Sullivan v. Wainwright, — U.S. —, 104 S.Ct. 450, 78 L.Ed.2d 210 (1983), support its conclusion that the Baldus Study does not make a strong enough showing of effects to justify an inference of intent. But to the extent that these cases offer any guidance at all regarding the legal standards applicable to these studies,17 it is clear that the Court considered the validity of the studies rather than their sufficiency. In Sullivan, the Supreme Court refused to stay the execution simply because it agreed with the decision of this Court, a decision based on the validity of the study alone. 18 Sullivan v. Wainwright, 721 F.2d 316 (11th Cir. 1983) (citing prior cases rejecting statistical evidence because it did not account for non-racial explanations of the effects). As the majority mentions, the methodology of the Baldus Study easily surpasses that of the earlier studies involved in those cases.

<sup>16</sup> The majority apparently ignores its commitment to accept the validity of the Baldus Study when it questions the definition of "medium aggravation cases" used by Dr. Baldus.

<sup>17</sup> The opinion in Ford mentioned this issue in a single sentence; the order in Adams was not accompanied by any written opinion at all. None of the three treated this argument as a possible Eighth Amendment claim. Finally, the "death odds multiplier" is not the most pronounced statistic in the Baldus Study: a ruling of insufficiency based on that one indicator would not be controlling here.

<sup>&</sup>lt;sup>18</sup> Indeed, the Court indicated that it would have reached a different conclusion if the district court and this court had not been given the opportunity to analyze the statistics adequately. — U.S. —, 104 S.Ct. at 451, n. 3, 78 L.Ed.2d at 213, n. 3.

Thus, the Baldus Study offers a convincing explanation of the disproportionate effects of Georgia's death penalty system. It shows a clear pattern of sentencing that can only be explained in terms of race, and it does so in a context where direct evidence of intent is practically impossible to obtain. It strains the imagination to believe that the significant influence on sentencing left unexplained by 230 alternative factors is random rather than racial, especially in a state with an established history of racial discrimination. Turner v. Fouche, supra; Chapman v. King, 154 F.2d 460 (5th Cir.), cert. denied, 327 U.S. 800, 66 S.Ct. 905, 90 L.Ed. 1025 (1946). The petitioner has certainly presented evidence of intentional racial discrimination at work in the Georgia system. Georgia has within the meaning of the Eighth Amendment applied its statute arbitrarily and capriciously.

### III. THE VALIDITY OF THE BALDUS STUDY

The majority does not purport to reach the issue of whether the Baldus Study reliably proves what it claims to prove. However, the majority does state that the district court's findings regarding the validity of the study might foreclose habeas relief on this issue. Moreover, the majority opinion in several instances questions the validity of the study while claiming to be interested in its sufficiency alone. I therefore will summarize some of the reasons that the district court was clearly erroneous in finding the Baldus Study invalid.

The district court fell victim to a misconception that distorted its factual findings. The Court pointed out a goodly number of imperfections in the study but rarely went ahead to determine the significance of those imperfections. A court may not simply point to flaws in a statistical analysis and conclude that is completely unreliable or fails to prove what it was intended to prove. Rather, the Court must explain why the imperfection makes the study less capable of proving the proposition

that it was meant to support. Eastland v. Tennessee Valley Authority, 704 F.2d 613 (11th Cir.1983), cert. denied, — U.S. —, 104 S.Ct. 1415, 79 L.Ed.2d 741 (1984).

Several of the imperfections noted by the district court were not legally significant because of their minimal effect. Many of the errors in the data base match this description. For instance, the "mismatches" in data entered once for cases in the Irocedural Reform Study and again for the same cases in the Charging and Sentencing Study were scientifically negligible. The district court relied on the data that changed from one study to the next in concluding that the coders were allowed too much discretion. But most of the alleged "mismatches" resulted from intentional improvements in the coding techniques and the remaining errors 19 were not large enough to affect the results.

The data missing in some cases was also a matter of concern for the district court. The small effects of the missing data leave much of that concern unfounded. The race of the victim was uncertain in 6% of the cases at most <sup>20</sup>; penalty trial information was unavailable in the same percentage of cases. <sup>21</sup> The relatively small amount of missing data, combined with the large number of variables used in several of the models, should have led the

<sup>&</sup>lt;sup>19</sup> The remaining errors affected little more than one percent of the data in any of the models. Data errors of less than 10 or 12% generally do not threaten the validity of a model.

<sup>20</sup> Dr. Baldus used an "imputation method," whereby the rate of the victim was assumed to be the same as the race of the defendant. Given the predominance of murders where the victim and defendant were of the same race, this method was a reasonable way of estimating the number of victims of each race. It further reduced the significance of this missing data.

<sup>&</sup>lt;sup>21</sup> The district court, in assessing the weight to be accorded this omission, assumed that Dr. Baldus was completely unsuccessful in predicting how many of the cases led to penalty trials. Since the prediction was based on discernible trends in the rest of the cases, the district court was clearly erroneous to give no weight to the prediction.

court to rely on the study. Statistical analyses have never been held to a standard of perfection or near perfection in order for courts to treat them as competent evidence. Trout v. Lehman, 702 F.2d 1094, 1101-02 (D.C. Cir. 1983). Minor problems are inevitable in a study of this scope and complexity: the stringent standards used by the district court would spell the loss of most statistical evidence.

Other imperfections in the study were not significant because there was no reason to believe that the problem would work systematically to expand the size of the raceof-the-victim factor rather than to contract it or leave it unchanged. The multicollinearity problem is a problem of notable proportions that nonetheless did not increase the size of the race-of-the-victim factor.22 Ideally the independent variables in a regression analysis should not be related to one another. If one independent variable merely serves as a proxy for another, the model suffers from "multicollinearity." That condition could either

Baldus later demonstrated that the U codes did not affect the race-of-the-victim factor by recoding all the items coded with a U and treating them as present. Each of the tests showed no significant reduction in the racial variable. The district court rejected this demonstration because it was not carried out using the largest

available model.

<sup>22</sup> The treatment of the coding conventions provides another example. The district court criticized Dr. Baldus for treating "U" codes (indicating uncertainty as to whether a factor was present in a case) as being beyond the knowledge of the jury and prosecutor ("absent") rather than assuming that the decisionmakers knew about the factor ("present"). Baldus contended that, if the extensive records available on each case did not disclose the presence of a factor, chances were good that the decisionmakers did not know of its presence, either. Dr. Berk testified that the National Academy of Sciences had considered this same issue and had recommended the course taken by Dr. Baldus. Dr. Katz, the expert witness for the state, suggested removing the cases with the U codes from the study altogether. The district court's suggestion, then, that the U codes be treated as present, appears to be groundless and clearly erroneous.

reduce the statistical significance of the variables or distort their relationships to one another. Of course, to the extent that multicollinearity reduces statistical significance it suggests that the racial influence would be even more certain if the multicollinearity had not artificially depressed the variable's statistical significance. As for the distortions in the relationships between the variables, experts for the petitioner explained that multicollinearity tends to dampen the racial effect rather than enhance it.<sup>23</sup>

The district court did not fail in every instance to analyze the significance of the problems. Yet when it did reach this issue, the court at times appeared to misunderstand the nature of this study or of regression analysis generally. In several related criticisms, it found that any of the models accounting for less than 230 independent variables were completely worthless (580 F.Supp. at 361), that the most complete models were unable to capture every nuance of every case (580 F.Supp. at 356, 371), and that the models were not sufficiently predictive to be relied upon in light of their low R<sup>2</sup> value (580 F.Supp. at 361).<sup>24</sup> The majority implicitly questions the validity of the Baldus Study on several occasions when it adopts the first two of these criticisms.<sup>25</sup> A proper under-

<sup>23</sup> The district court rejected this expert testimony, not because of any rebuttal testimony, but because it allegedly conflicted with the petitioner's other theory that multicollinearity affects statistical significance. 580 F.Supp. at 364. The two theories are not inconsistent, for neither Dr. Baldus nor Dr. Woodworth denied that multicollinearity) might have multiple effects. The two theories each analyze one possible effect. Therefore, the district court rejected this testimony on improper grounds.

<sup>&</sup>lt;sup>24</sup> The R<sup>2</sup> measurement represents the influence of random factors unique to each case that could not be captured by addition of another independent variable. As R<sup>2</sup> approaches a value of 1.0, one can be more sure that the independent variables already identified are accurate and that no significant influences are masquerading as random influences.

<sup>&</sup>lt;sup>25</sup> See, e.g., pp. 896, 899.

standing of statistical methods shows, however, that these are not serious shortcomings in the Baldus Study.

The district court mistrusted smaller models because it placed too much weight on one of the several complementary goals of statistical analysis. Dr. Baldus testified that in his opinion the 39-variable model was the best among the many models he produced. The district court assumed somewhat mechanistically that the more independent variables encompassed by a model, the better able it was to estimate the proper influence of non-racial factors. But in statistical models, bigger is not always better. After a certain point, additional independent variables become correlated with variables already being considered and distort or suppress their influence. The most accurate models strike an appropriate balance between the risk of omitting a significant factor and the risk of multicollinearity. Hence, the district court erred in rejecting all but the largest models.

The other two criticisms mentioned earlier spring from a single source—the misinterpretation of the R<sup>2</sup> measurement. The failure of the models to capture every nuance of every case was an inevitable but harmless failure. Regression analysis accounts for this limitation with an R<sup>2</sup> measurement. As a result, it does not matter that a study fails to consider every nuance of every case because random factors (factors that influence the autcome in a sporadic and unsystematic way) do not impugn the reliability of the systemwide factors already identified, including race of the victim. Failure to consider extra factors becomes a problem only where they operate throughout the system, that is, where R<sup>2</sup> is inappropriately low.

The district court did find that the R<sup>2</sup> of the 230-variable study, which was nearly .48, was too low.<sup>27</sup> But an

<sup>26</sup> See footnote 24.

<sup>27</sup> It based that finding on the fact that a model with an R<sup>2</sup> less than .5 "does not predict the outcome in half of the cases." This is an inaccurate statement, for an R<sup>2</sup> actually represents the per-

R<sup>2</sup> of that size is not inappropriately low in every context.<sup>28</sup> The R<sup>2</sup> measures random factors unique to each case: in areas where such factors are especially likely to occur, one would expect a low R<sup>2</sup>. As the experts, the district court and the majority have pointed out, no two death penalty cases can be said to be exactly alike, and it is especially unlikely for a statistical study to capture every influence on a sentence. In light of the random factors at work in the death penalty context, the district court erred in finding the R<sup>2</sup> of all the Baldus Study models too low.<sup>29</sup>

Errors of this sort appear elsewhere in the district court opinion and leave me with the definite and firm conviction that the basis for the district court's ruling on the invalidity of the study was clearly erroneous. United States v. Gypsum Co., 333 U.S. 364, 395, 68 S.Ct. 525, 541, 92 L.Ed. 746 (1948). This statistical analysis, while imperfect, is sufficiently complete and reliable to serve as competent evidence to guide the court. Accordingly, I would reverse the judgment of the district court with regard to the validity of the Baldus Study. I would also reverse that court's determination that an Eighth Amend-

centage of the original 11-to-1 differential explained by all the independent variables combined. A model with an R<sup>2</sup> of less than .5 would not necessarily fail to predict the outcome in half the cases because the model improves upon pure chance as a way of correctly predicting an outcome. For dichotomous outcomes (i.e. the death penalty is imposed or it is not), random predictions could succeed half the time.

 $<sup>^{28}</sup>$  Wilkins v. University of Houston, 654 F.2d 388, 405 (5th Cir. 1981), is not to the contrary. That court stated only that it could not know whether an  $R^2$  of .52 or .53 percent would be inappropriately low in that context since the parties had not made any argument on the issue.

<sup>&</sup>lt;sup>29</sup> Furthermore, an expert for the petitioner offered the unchallenged opinion that the  $R^2$  measurements in studies of dichotomous outcomes are understated by as much as 50%, placing the  $R^2$  values of the Baldus Study models somewhere between .7 and .9.

ment claim is not available to the petitioner. He is entitled to relief on this claim.

#### IV. OTHER ISSUES

I concur in the opinion of the court with regard to the death-oriented jury claim and in the result reached by the court on the ineffective assistant of counsel claim. I must dissent, however, on the two remaining issues in the case. I disagree with the holding on the Giglio issue, on the basis of the findings and conclusions of the district court and the dissenting opinion of Chief Judge Godbold. As for the Sandstrom claim, I would hold that the instruction was erroneous and that the error was not harmless.

It is by no means certain that an error of this sort can be harmless. See Connecticut v. Johnson, 460 U.S. 73, 103 S.Ct. 969, 74 L.Ed.2d 823 (1983). Even if an error could be harmless, the fact that McCleskey relied on an alibi defense does not mean that intent was "not at issue" in the case. Any element of a crime can be at issue whether or not the defendant presents evidence that disputes the prosecution's case on that point. The jury could find that the prosecution had failed to dispel all reasonable doubts with regard to intent even though the defendant did not specifically make such an argument. Intent is at issue wherever there is evidence to support a reasonable doubt in the mind of a reasonable juror as to the existence of criminal intent. See Lamb v. Jernigan, 683 F.2d 1332, 1342-43 (11th Cir.1982) ("no reasonable juror could have determined . . . that appellant acted out of provocation or self-defense," therefore error was harmless).

The majority states that the raising of an alibi defense does not automatically render a Sandstrom violation harmless. It concludes, however, that the raising of a non-participation defense coupled with "overwhelming evidence of an intentional killing" will lead to a finding of harmless error. The majority's position is indistinguishable from a finding of harmless error based solely

on overwhelming evidence.<sup>30</sup> Since a defendant normally may not relieve the jury of its responsibility to make factual findings regarding every element of an offense, the only way for intent to be "not at issue" in a murder trial is if the evidence presented by either side provides no possible issue of fact with regard to intent. Thus, McCleskey's chosen defense in this case should not obscure the sole basis for the disagreement between the majority and myself: the reasonable inferences that could be drawn from the circumstances of the killing. I cannot agree with the majority that no juror, based on any reasonable interpretation of the facts, could have had a reasonable doubt regarding intent.

Several factors in this case bear on the issue of intent. The shooting did not occur at point-blank range. Furthermore, the officer was moving at the time of the shooting. On the basis of these facts and other circumstances of the shooting, a juror could have had a reasonable doubt as to whether the person firing the weapon intended to kill. While the majority dismisses this possibility as "mere speculation," the law requires an appellate court to speculate about what a reasonable juror could have concluded. Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979); United States v. Bell, 678 F.2d 547, 549 (5th Cir. Unit B 1982) (en banc), aff'd on other grounds, 462 U.S. 356, 103 S.Ct. 2398, 76 L.Ed.2d 638 (1983). Therefore, the judgment of the district court should be reversed on this ground, as well.

<sup>30</sup> Indeed, the entire harmless error analysis employed by the court may be based on a false dichotomy between "overwhelming evidence" and elements "not at issue." Wherever intent is an element of a crime, it can only be removed as an issue by overwhelming evidence. The observation by the plurality in Connecticut v. Johnson, supra, that a defendant may in some cases "admit" an issue, should only apply where the evidence allows only one conclusion. To allow an admission to take place in the face of evidence to the contrary improperly infringes on the jury's duty to consider all relevant evidence.

HATCHETT, Circuit Judge, dissenting in part, and concurring in part: 1

In this case, the Georgia system of imposing the death penalty is shown to be unconstitutional. Although the Georgia death penalty statutory scheme was held constitutional "on its face" in *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976), application of the scheme produces death sentences explainable only on the basis of the race of the defendant and the race of the victim.

I write to state clearly and simply, without the jargon of the statisticians, the results produced by the application of the Georgia statutory death penalty scheme, as

shown by the Baldus Study.

The Baldus Study is valid. The study was designed to answer the questions when, if ever, and how much, if at all, race is a factor in the decision to impose the death penalty in Georgia. The study gives the answers: In Georgia, when the defendant is black and the victim of murder is white, a 6 percent greater chance exists that the defendant will receive the death penalty solely because the victim is white. This 6 percent disparity is present throughout the total range of death-sentenced black defendants in Georgia. While the 6 percent is troublesome, it is the disparity in the mid-range on which I focus. When cases are considered which fall in the midrange, between less serious and very serious aggravating circumstances, where the victim is white, the black defendant has a 20 percent greater chance of receiving the death penalty because the victim is white, rather than black. This is intolerable; it is in this middle range of cases that the decision on the proper sentence is most dif-

<sup>&</sup>lt;sup>1</sup> Although I concur with the majority opinion on the ineffective assistance of counsel and death-oriented jury issues, I write separately to express my thoughts on the Baldus Study.

I also join Chief Judge Godbold's dissent, as to the Giglio issue, and Judge Johnson's dissent.

ficult and imposition of the death penalty most questionable.

The disparity shown by the study arises from a variety of statistical analyses made by Dr. Baldus and his colleagues. First, Baldus tried to determine the effect of race of the victim in 594 cases (PRS study) comprising all persons convicted of murder during a particular period. To obtain better results, consistent with techniques approved by the National Academy of Sciences, Baldus identified 2,500 cases in which persons were indicted for murder during a particular period and studied closely 1,066 of those cases. He identified 500 factors, bits of information, about the defendants, the crime, and other circumstances surrounding each case which he thought had some impact on a death sentence determination. Additionally, he focused on 230 of these factors which he thought most reflected the relevant considerations in a death penalty decision. Through this 230-factor model, the study proved that black defendants indicted and convicted for murder of a white victim begin the penalty stage of trial with a significantly greater probability of receiving the death penalty, solely because the victim is white.

Baldus also observed thirty-nine factors, including information on aggravating circumstances, which match the circumstances in this case. This focused study of the aggravating circumstances in the mid-range of severity indicated that "white victim crimes were shown to be 20 percent more likely to result in a death penalty sentence than equally aggravated black victim crimes." Majority at 896.

We must not lose sight of the fact that the 39-factor model considers information relevant to the impact of the decisions being made by law enforcement officers, prosecutors, judges, and juries in the decision to impose the death penalty. The majority suggests that if such a disparity resulted from an identifiable actor or agency in the prosecution and sentencing process, the present 20 percent

racial disparity could be great enough to declare the Georgia system unconstitutional under the eighth amendment. Because this disparity is not considered great enough to satisfy the majority, or because no identification of an actor or agency can be made with precision, the majority holds that the statutory scheme is approved by the Constitution. Identified or unidentified, the result of the unconstitutional ingredient of race, at a significant level in the system, is the same on the black defendant. The inability to identify the actor or agency has little to do with the constitutionality of the system.

The 20 percent greater chance in the mid-range cases (because the defendant is black and the victim is white), produces a disparity that is too high. The study demonstrates that the 20 percent disparity, in the real world, means that one-third of the black defendants (with white victims) in the mid-range cases will be affected by the race factor in receiving the death penalty. Race should not be allowed to take a significant role in the decision to impose the death penalty.

The Supreme Court has reminded us on more than one occasion that "if a state wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty." Godfrey v. Georgia, 446 U.S. 420, 428, 100 S.Ct. 1759, 1764, 64 L.Ed. 2d 398 (1980). A statute that intentionally or unintentionally allows for such racial effects is unconstitutional under the eighth amendment. Because the majority holds otherwise, I dissent.<sup>2</sup>

<sup>&</sup>lt;sup>2</sup> Nothing in the majority opinion regarding the validity, impact, or constitutional significance of studies on discrimination in application of the Florida death penalty scheme should be construed to imply that the United States Supreme Court has squarely passed on the Florida studies. Neither the Supreme Court nor the Eleventh Circuit has passed on the Florida studies, on a fully developed record (as in this case), under fourteenth and eighth amendment challenges.

CLARK, Circuit Judge, dissenting in part and concurring in part \*:

We are challenged to determine how much racial discrimination, if any, is tolerable in the imposition of the death penalty. Although I also join in Judge Johnson's dissent, this dissent is directed to the majority's erroneous conclusion that the evidence in this case does not establish a prima facie Fourteenth Amendment violation.

## The Study

The Baldus study, which covers the period 1974 to 1979, is a detailed study of over 2,400 homicide cases. From these homicides, 128 persons received the death penalty. Two types of racial disparity are established—one based on the race of the victim and one based on the race of the defendant. If the victim is white, a defendant is more likely to receive the death penalty. If the defendant is black, he is more likely to receive the death penalty. One can only conclude that in the operation of this system the life of a white is dearer, the life of a black cheaper.

Before looking at a few of the figures, a perspective is necessary. Race is a factor in the system only where there is room for discretion, that is, where the decision maker has a viable choice. In the large number of cases, race has no effect. These are cases where the facts are so mitigated the death penalty is not even considered as a possible punishment. At the other end of the spectrum are the tremendously aggravated murder cases where the defendant will very probably receive the death penalty, regardless of his race or the race of the victim. In between is the mid-range of cases where there is an approximately 20% racial disparity.

<sup>\*</sup> Although I concur with the majority opinion on the ineffective assistance of counsel and death oriented jury issues, I write separately to express my thoughts on the Baldus Study. I also join Chief Judge Godbold's dissent and Judge Johnson's dissent.

The Baldus study was designed to determine whether like situated cases are treated similarly. As a starting point, an unanalyzed arithmetic comparison of all of the cases reflected the following:

Death Sentencing Rates by Defendant/ Victim Racial Combination 1

		_
В	C	D
White	Black	White
Defendant/	Defendant/	Defendant/
White Victim	Black Victim	Black Victim
.08	.01	.03
(58/745)	(18/1438)	(2/64)
		013
073)	(20	/1502)
	Defendant/ White Victim .08 (58/745)	Defendant/ White Victim

These figures show a gross disparate racial impact—that where the victim was white there were 11% death sentences, compared to only 1.3 percent death sentences when the victim was black. Similarly, only 8% of white defendants received the death penalty when the victim was white. The Supreme Court has found gross disparities to be sufficient proof of discrimination to support a Fourteenth Amendment violation.<sup>2</sup>

The Baldus study undertook to determine if this racial sentencing disparity was caused by considerations of race or because of other factors or both. In order to find out, it was necessary to analyze and compare each of the potential death penalty cases and ascertain what relevant factors were available for consideration by the decision makers.<sup>3</sup> There were many factors such as prior capital record, contemporaneous offense, motive, killing to avoid

<sup>&</sup>lt;sup>1</sup> DB Exhibit 63.

<sup>&</sup>lt;sup>2</sup> See discussion below at Page 9.

<sup>&</sup>lt;sup>3</sup> An individualized method of sentencing makes it possible to differentiate each particular case "in an objective, evenhanded, and substantially rational way from the many Georgia murder cases in which the death penalty may not be imposed." Zant v. Stephens, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235, 251.

arrest or for hire, as well as race. The study showed that race had as much or more impact than any other single factor. See Exhibits DB 76-78, T-776-87. Stated another way, race influences the verdict just as much as any one of the aggravating circumstances listed in Georgia's death penalty statute.4 Therefore, in the application of the statute in Georgia, race of the defendant and of the victim, when it is black/white, functions as if it were an aggravating circumstance in a discernible number of cases. See Zant v. Stephens, 462 U.S. 862, 103 S.Ct. 2733, 2747, 77 L.Ed.2d 235 (1983) (race as an aggravating circumstance would be constitutionally impermissible).

Another part of the study compared the disparities in death penalty sentencing according to race of the defendant and race of the victim and reflected the differences in the sentencing depending upon the predicted chance of death, i.e., whether the type of case was or was not one

where the death penalty would be given.

<sup>4</sup> I.C.G.A. § 17-10-30.

Table 43

RACE OF DEFENDANT DISPARITIES IN DEATH SENTENCING RATES CONTROLLING FOR THE PREDICTED LIKELIHOOD OF A DEATH SENTENCE AND THE RACE OF THE VICTIM

A	В	C	D	E	F	G	Н	I	J
Predicted Chance of a Death Sentence 1	Average Actual Sentencing Rate for the	Sentencing White	ath g Rates for Victim nvolving	Arithmetic Difference in Race of the	Ratio of Race of the	Sentencin Black	ath g Rates for Victim nvolving	Arithmetic Difference in Race of the	Ratio of Race of the
(least) to 8 (highest)	Cases at Each Level	Black Defendants	White Defendants	Defendant Rates (Col. C-Col. D)	Defendant Rates (Col. C/Col. D)	Black Defendants	White Defendants	Defendant Rates (Col. C-Col. H)	Defendant Rates (Col. C-Col. H)
1	.0 (0/33)	.0 (0/9)	.0 (0/5)	.0	-	.0 (0/19)	-	-	.0
2	.0 (0/56)	.0 (0/8)	.0 (0/19)	.0	-	.0 (0/27)	.0 (0/1)	.0	.0
3	.08 (6/77)	.30 (3/10)	.03 (1/39)	.27	10.	.11 (2/18)	.0 (0/9)	.11	.0
4	.07 (4/57)	.23 (3/13)	.04 (1/29)	.19	5.75	.0 (0/15)	-	-	-
5	.27 (15/58)	.35 (9/26)	.20 (4/20)	.15	1.75	.17 $(2/12)$	-	-	-
6	.18 (11/63)	.38 (3/8)	.16 (5/32)	.22	2.38	05 (1/20)	.50 $(2/4)$	45	.10
7	.41 (29/70)	.64 (9/14)	.39 (15/39)	.25	1.64	.39 (5/13)	.0 (0/5)	.39	.0
8	.88 (51/58)	.91 $(20/22)$	.89 (25/28)	.02	1.02	.75 6/8)	-	-	-



Columns A and B reflect the step progression of least aggravated to most aggravated cases. Table 43, DB, Ex. 91.5 Columns C and D compare sentencing rates of black defendants to white defendants when the victim is white and reflect that in Steps 1 and 2 no death penalty was given in those 41 cases. In Step 8, 45 death penalties were given in 50 cases, only two blacks and three whites escaping the death penalty—this group obviously representing the most aggravated cases. By comparing Steps 3 through 7, one can see that in each group black defendants received death penalties disproportionately to white defendants by differences of .27, .19, .15, .22, and .25. This indicates that unless the murder is so vile as to almost certainly evoke the death penalty (Step 8), blacks are approximately 20% more likely to get the death penalty.

The right side of the chart reflects how unlikely it is that any defendant, but more particularly white defendants, will receive the death penalty when the victim is black.

## Statistics as Proof

The jury selection cases have utilized different methods of statistical analysis in determining whether a disparity is sufficient to establish a prima facie case of purposeful discrimination. Early jury selection cases, such as *Swain* 

<sup>&</sup>lt;sup>5</sup> The eight sub-groups were derived from the group of cases where the death penalty was predictably most likely based upon an analysis of the relevant factors that resulted in the vast majority of defendants receiving the death penalty—116 out of the total 128. This group was then sub-divided into the eight sub-groups in ascending order giving consideration to more serious aggravating factors and larger combinations of them as the steps progress. Tr. pages 877-83.

<sup>&</sup>lt;sup>6</sup> In Villafane v. Manson, 504 F.Supp. 78 (D.Conn. 1980), the court noted that four forms of analysis have been used: (1) the absolute difference test used in Swain v. Alabama, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965); (2) the ratio approach; (3) a test that moves away from the examination of percentages and

v. Alabama, used very simple equations which primarily analyzed the difference of minorities eligible for jury duty from the actual number of minorities who served on the jury to determine if a disparity amounted to a substantial underrepresentation of minority jurors. Because this simple method did not consider many variables in its equation, it was not as accurate as the complex statistical equations widely used today.

The mathematical disparities that have been accepted by the Court as adequate to establish a prima facie case of purposeful discrimination range approximately from 14% to 40%. "Whether or not greater disparities constitute prima facie evidence of discrimination depends upon the facts of each case." 10

Statistical disparities in jury selection cases are not sufficiently comparable to provide a complete analogy.

focuses on the differences caused by underrepresentation in each jury; and (4) the statistical decision theory which was fully embraced in Castaneda v. Partida, 430 U.S. at 496 n. 17, 97 S.Ct. at 1281 n. 17. See also Finkelstein, The Application of Statistical Decision Theory to the Jury Discrimination Cases, 80 Harv.L.Rev. 338 (1966).

<sup>&</sup>lt;sup>7</sup> See Swain v. Alabama, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965); Villafane v. Manson, 504 F.Supp. at 83.

<sup>&</sup>lt;sup>8</sup> See Finkelstein, The Application of Statistical Decision Theory to the Jury Discrimination Cases, 80 Harv.L.Rev. 338, 363 (1966) ("The Court did not reach these problems in Swain because of its inability to assess the significance of statistical data without mathematical tools.").

<sup>&</sup>lt;sup>9</sup> Castaneda v. Partida, 430 U.S. at 495-96, 97 S.Ct. at 1280-82 (disparity of 40%); Turner v. Fouche, 396 U.S. 346, 90 S.Ct. 532, 24 L.Ed.2d 567 (1970) (disparity of 23%); Whitus v. Georgia, 385 U.S. 545, 87 S.Ct. 643, 17 L.Ed.2d 599 (1967) (disparity of 18%); Sims v. Georgia, 389 U.S. 404, 88 S.Ct. 523, 19 L.Ed.2d 634 (1967) (disparity of 19.7%); Jones v. Georgia, 389 U.S. 24, 88 S.Ct. 4, 19 L.Ed.2d 25 (1967) (disparity of 14.7%). These figures result from the computation used in Swain.

<sup>&</sup>lt;sup>10</sup> United States ex rel Barksdale v. Blackburn, 639 F.2d 1115, 1122 (5th Cir. 1981) (en banc).

There are no guidelines in decided cases so in this case we have to rely on reason. We start with a sentencing procedure that has been approved by the Supreme Court. The object of this system, as well as any constitutionally permissible capital sentencing system, is to provide individualized treatment of those eligible for the death penalty to insure that non-relevant factors, *i.e.* factors that do not relate to this particular individual or the crime committed, play no part in deciding who does and who does not receive the death penalty. The facts disclosed by the Baldus study, some of which have been previously discussed, demonstrate that there is sufficient disparate treatment of blacks to establish a prima facie case of discrimination.

This discrimination, when coupled with the historical facts, demonstrate a prima facie Fourteenth Amendment violation of the Equal Protection Clause. It is that discrimination against which the Equal Protection Clause stands to protect. The majority, however, fails to give full reach to our Constitution. While one has to acknowledge the existence of prejudice in our society, one cannot and does not accept its application in certain contexts. This is nowhere more true than in the administration of criminal justice in capital cases.

<sup>&</sup>lt;sup>11</sup> Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976).

<sup>12</sup> The sentencing body's decision must be focused on the "particularized nature of the crime and the particularized characteristics of the individual defendant." 428 U.S. at 206, 96 S.Ct. at 2940. See also Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) ("the need for treating each defendant in a capital case with degree of respect due the uniqueness of the individual is far more important than in non-capital cases." 438 U.S. at 605, 98 S.Ct. at 2965); Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 does focus on a characteristic of the particular defendant, albeit an impermissible one. See infra, p. 3.

## The Fourteenth Amendment and Equal Protection

"A showing of intent has long been required in all types of equal protection cases charging racial discrimination." <sup>15</sup> The Court has required proof of intent before it will strictly scrutinize the actions of a legislature or any official entity. <sup>14</sup> In this respect, the intent rule is a tool of self-restraint that serves the purpose of limiting judicial review and policymaking. <sup>15</sup>

The intent test is not a monolithic structure. As with all legal tests, its focus will vary with the legal context in which it is applied. Because of the variety of situations in which discrimination can occur, the method of proving intent is the critical focus. The majority, by failing to recognize this, misconceives the meaning of intent in the context of equal protection jurisprudence.

Intent may be proven circumstantially by utilizing a variety of objective factors and can be inferred from the totality of the relevant facts.<sup>16</sup> The factors most appro-

<sup>&</sup>lt;sup>13</sup> Rogers v. Lodge, 458 U.S. 613, 102 S.Ct. 3272, 3276, 73 L.Ed.2d 1012 (1982).

<sup>&</sup>lt;sup>14</sup> Id. at n. 5 ("Purposeful racial discrimination invokes the strictest scrutiny of adverse differential treatment. Absent such purpose, differential impact is subject only to the test of rationality."); see also Sellers, The Impact of Intent on Equal Protection Jurisprudence, 84 Dick.L.Rev. 363, 377 (1979) ("the rule of intent profoundly affects the Supreme Court's posture toward equal protection claims.").

<sup>15</sup> The intent rule "serves a countervailing concern of limiting judicial policy making. Washington v. Davis can be understood . . . as a reflection of the Court's own sense of institutional self-restraint—a limitation on the power of judicial review that avoids having the Court sit as a super legislature. . . ." Note, Section 1981: Discriminatory Purpose or Disproportionate Impact, 80 Colum.L.R. 137, 160-61 (1980); see also Washington v. Davis, 426 U.S. 229, 247-48, 84 S.Ct. 2040, 2051, 48 L.Ed.2d 597 (1976).

<sup>&</sup>lt;sup>16</sup> See Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 266, 97 S.Ct. 555, 564, 50 L.Ed.2d 450 (1977).

priate in this case are: (1) the presence of historical discrimination; and (2) the impact, as shown by the Baldus study, that the capital sentencing law has on a suspect class.<sup>17</sup> The Supreme Court has indicated that:

Evidence of historical discrimination is relevant to drawing an inference of purposeful discrimination, particularly . . . where the evidence shows that discriminatory practices were commonly utilized, that they were abandoned when enjoined by courts or made illegal by civil rights legislation, and that they were replaced by laws and practices which, though neutral on their face, serve to maintain the status quo.<sup>18</sup>

Evidence of disparate impact may demonstrate that an unconstitutional purpose may continue to be at work, especially where the discrimination is not explainable on non-racial grounds. Table 43, supra p. 4, the table and the accompanying evidence leave unexplained the 20% racial disparity where the defendant is black and the victim is white and the murders occurred under very similar circumstances.

Although the Court has rarely found the existence of intent where disproportionate impact is the *only* proof, it has, for example, relaxed the standard of proof in jury

<sup>&</sup>lt;sup>17</sup> Id. See also Rogers v. Lodge, 102 S.Ct. at 3280.

<sup>&</sup>lt;sup>18</sup> Rogers v. Lodge, 102 S.Ct. at 3280.

<sup>19</sup> In Washington v. Davis, 426 U.S. at 242, 96 S.Ct. at 2049, the Court stated: "It is also not infrequently true that the discriminatory impact... may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on nonracial grounds." See also Personnel Administrator of Mass. v. Feeny, 442 U.S. 256, 99 S.Ct. 2282, 2296 n. 24, 60 L.Ed.2d 870 (1979) (Washington and Arlington recognize that when a neutral law has a disparate impact upon a group that has historically been a victim of discrimination, an unconstitutional purpose may still be at work).

selection cases because of the "nature" of the task involved in the selection of jurors.20 Thus, to show an equal protection violation in the jury selection cases, a defendant must prove that "the procedure employed resulted in a substantial under-representation of his race or of the identifiable group to which he belongs." 21 The idea behind this method is simple. As the Court pointed out, "[i]f a disparity is sufficiently large, then it is unlikely that it is due solely to chance or accident, and, in the absence of evidence to the contrary, one must conclude that racial or other class-related factors entered into the selection process." 22 Once there is a showing of a substantial underrepresentation of the defendant's group, a prima facie case of discriminatory intent or purpose is established and the state acquires the burden of rebutting the case.23

In many respects the the imposition of the death penalty is similar to the selection of jurors in that both processes are discretionary in nature, vulnerable to the bias of the decision maker, and susceptible to a rigorous statistical analysis.<sup>24</sup>

<sup>20</sup> Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. at 267 n. 13, 97 S.Ct. at 564 n. 13 ("Because of the nature of the jury-selection task, however, we have permitted a finding of constitutional violation even when the statistical pattern does not approach the extremes of Yick Wo [118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed.2d 220] or Gomillion [364 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d 110]"); see also International Bro. of Teamsters v. United States, 431 U.S. 324, 339, 97 S.Ct. 1843, 1856, 52 L.Ed.2d 396 (1977) ("We have repeatedly approved the use of statistical proof . . . to establish a prima facie case of racial discrimination in jury selection cases.").

 <sup>&</sup>lt;sup>21</sup> Castaneda v. Partida, 430 U.S. 482, 494, 97 S.Ct. 1272, 1280,
 51 L.E.2d 498 (1977).

<sup>22</sup> Id. at n. 13.

<sup>&</sup>lt;sup>23</sup> Id. at 495, 97 S.Ct. at 1280.

<sup>&</sup>lt;sup>24</sup> Joyner, Legal Theories for Attacking Racial Disparity in Sentencing, 18 Crim.L.Rep. 101, 110-11 (1982) ("In many respects")

The Court has refrained from relaxing the standard of proof where the case does not involve the selection of jurors because of its policy of: (1) deferring to the reasonable acts of administrators and executives; and (2) preventing the questioning of tax, welfare, public service, regulatory, and licensing statutes where disparate impact is the only proof.<sup>25</sup> However, utilizing the standards of proof in the jury selection cases to establish intent in this case will not contravene this policy because: (1) deference is not warranted where the penalty is grave and less severe alternatives are available; and (2) the court did not contemplate capital sentencing statutes when it established this policy. Thus, statistics alone could be utilized to prove intent in this case. But historical background is also relevant and supports the statistical conclusions.

"Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of Justice." <sup>26</sup> It is the duty of the courts to see to it that throughout the procedure for bringing a person to justice, he shall enjoy "the protection which the Constitution guarantees." <sup>27</sup> In an imperfect society, one has to admit that it is impossible to guarantee that the administrators of justice, both judges and jurors, will successfully wear

sentencing is similar to the selections of jury panels as in Castaneda."). The majority opinion notes that the Baldus study ignores quantitative difference in cases: "looks, age, personality, education, profession, job, clothes, demeanor, and remorse. . . ." Majority opinion at 62. However, it is these differences that often are used to mask, either intentionally or unintentionally, racial prejudice.

<sup>&</sup>lt;sup>25</sup> See Washington v. Davis, 426 U.S. at 248, 96 S.Ct. at 2051; Note, Section 1981: Discriminatory Purpose or Disproportionate Impact, 80 Colum.L.R. 137, 146-47 (1980).

<sup>&</sup>lt;sup>26</sup> Rose v. Mitchell, 443 U.S. 545, 556, 99 S.Ct. 2993, 61 L.Ed.2d 739 (1979).

<sup>&</sup>lt;sup>27</sup> Rose, supra, 443 U.S. at 557, 99 S.Ct. at 3000.

racial blinders in every case.<sup>28</sup> However, the risk of prejudice must be minimized and where clearly present eradicated.

Discrimination against minorities in the criminal justice system is well documented.<sup>20</sup> This is not to say that progress has not been made, but as the Supreme Court in 1979 acknowledged,

we also cannot deny that, 114 years after the close of the War between the States and nearly 100 years after *Strauder* [100 U.S. 303, 25 L.Ed. 664] racial and other forms of discrimination still remain a fact of life, in the administration of justice as in our society as a whole. Perhaps today that discrimination

Even if you imagine the most perfect judicial system, even if you find the most upright and the most enlightened judges, you will still have to allow place for error or prejudice.

Robespierre (G. Rude ed. 1967).

<sup>20</sup> See, e.g., Johnson v. Virginia, 373 U.S. 61, 83 S.Ct. 1053, 10 L.Ed.2d 195 (1963) (invalidating segregated seating in courtrooms); Hamilton v. Alabama, 376 U.S. 650, 84 S.Ct. 982, 11 L.Ed.2d 979 (1964) (conviction reversed when black defendant was racially demeaned on cross-examination); Davis v. Mississippi, 394 U.S. 721, 89 S.Ct. 1394, 22 L.Ed.2d 676 (1969) (mass fingerprinting of young blacks in search of rape suspect overturned). See also Rose v. Mitchell, supra (racial discrimination in grand jury selection); Rogers v. Britton, 476 F.Supp. 1036 (E.D.Ark. 1979). A very recent and poignant example of racial discrimination in the criminal justice system can be found in the case of Bailey v. Vining, unpublished order, civ. act. no. 76-199 (M.D.Ga. 1978). In Bailey, the court declared the jury selection system in Putnam County, Georgia to be unconstitutional. The Office of the Solicitor sent the jury commissioners a memo demonstrating how they could underrepresent blacks and women in traverse and grand juries but avoid a prima facie case of discrimination because the percentage disparity would still be within the parameters of Supreme Court and Fifth Circuit case law. See notes 7-8 supra and relevant text. The result was that a limited number of blacks were handpicked by the jury commissioners for service.

<sup>28</sup> As Robespierre contended almost 200 years ago:

takes a form more subtle than before. But it is no less real or pernicious.<sup>30</sup>

If discrimination is especially pernicious in the administration of justice, it is nowhere more sinister and abhorment than when it plays a part in the decision to impose society's ultimate sanction, the penalty of death. It is also a tragic fact that this discrimination is very much a part of the country's experience with the death penalty. Again and as the majority points out, the new post-Furman statutes have improved the situation but the Baldus study shows that race is still a very real factor in capital cases in Georgia. Some of this is conscious discrimination, some of it unconscious, but it is nonetheless real and it is important that we at least admit that discrimination is present.

<sup>30</sup> Rose, supra, 443 U.S. at 558-59, 99 S.Ct. at 3001.

<sup>&</sup>lt;sup>31</sup> See, e.g., Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) (see especially the opinions of Douglas, J., concurring, id. at 249-252, 92 S.Ct. at 2731-2733; Stewart, J., concurring, id. at 309-310, 92 S.Ct. at 2762; Marshall, J., concurring, id. at 364-365, 92 S.Ct. at 2790; Burger, C.J., dissenting, id. at 389-390 n. 12, 92 S.Ct. at 2803-2804 n. 12; Powell, J., dissenting, id. at 449, 92 S.Ct. at 2833).

<sup>32</sup> This historical discrimination in the death penalty was pointed out by Justice Marshall in his concurring opinion in Furman, supra. 408 U.S. at 364-65, 92 S.Ct. at 2790 "[i]ndeed a look at the bare statistics regarding executions is enough to betray much of the discrimination." Id. See also footnote 32 for other opinions in Furman discussing racial discrimination and the death penalty. For example, between 1930 and 1980, 3,863 persons were executed in the United States, 54% of those were blacks or members of minority groups. Of the 455 men executed for rape, 89.5% were black or minorities. Sarah T. Dike, Capital Punishment in the United States, p. 43 (1982). Of the 2,307 people executed in the South during that time period, 1659 were black. During the same fifty-year period in Georgia, of the 366 people executed, 298 were black. Fifty-eight blacks were executed for rape as opposed to only three whites. Six blacks were executed for armed robbery while no whites were. Hugh A. Bedau, ed., The Death Penalty in America (3rd ed 1982).

Finally, the state of Georgia also has no compelling interest to justify a death penalty system that discriminates on the basis of race. Hypothetically, if a racial bias reflected itself randomly in 20% of the convictions, one would not abolish the criminal justice system. Ways of ridding the system of bias would be sought but absent a showing of bias in a given case, little else could be done. The societal imperative of maintaining a criminal justice system to apprehend, punish, and confine perpetrators of serious violations of the law would outweigh the mandate that race or other prejudice not infiltrate the legal process. In other words, we would have to accept that we are doing the best that can be done in a system that must be administered by people, with all their conscious and unconscious biases.

However, such reasoning cannot sensibly be invoked and bias cannot be tolerated when considering the death penalty, a punishment that is unique in its finality.<sup>33</sup> The evidence in this case makes a prima facie case that the death penalty in Georgia is being applied disproportionately because of race. The percentage differentials are not de minimis. To allow the death penalty under such circumstances is to approve a racial preference in the most serious decision our criminal justice system must make. This is a result our Constitution cannot tolerate.

The majority in this case does not squarely face up to this choice and its consequences. Racial prejudice/preference both conscious and unconscious is still a part of the capital decision making process in Georgia. To allow this system to stand is to concede that in a certain number of cases, the consideration of race will be a factor in the decision whether to impose the death penalty. The Equal Protection Clause of the Fourteenth Amendment does not allow this result. The decision of the district court on the Baldus issue should be reversed and the state required to subit evidence, if any is available, to disprove the prima facie case made by the plaintiff.

<sup>&</sup>lt;sup>33</sup> See, e.g., Woodson v. North Carolina, 428 U.S. 280, 305, 96
S.Ct. 2978, 49 L.Ed.2d 944 (1976).

## SUPREME COURT OF THE UNITED STATES

#### No. 84-6811

WARREN MCCLESKY, PETITIONER

v.

RALPH KEMP, Superintendent, Georgia Diagnostic and Classification Center

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Eleventh Circuit.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted, limited to Questions 1, 2, 3, 4 and 5 presented by the petition.

July 7, 1986

SEP 3 1966

JOSEPH F. SPANIOL, JR.

No. 84-6811

#### IN THE

## Supreme Court of the United States

OCTOBER TERM, 1985

WARREN MCCLESKEY,

Petitioner,

V.

RALPH M. KEMP, Superintendent, Georgia Diagnostic & Classification Center.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

## BRIEF FOR PETITIONER

TIMOTHY K. FORD 600 Pioneer Building Seattle, Washington 98104

Anthony G. Amsterdam
New York University
School of Law
40 Washington Sq. South
New York, New York 10012

Attorneys for Petitioner

Julius L. Chambers
James M. Nabrit, III

\*John Charles Boger
Deval L. Patrick
Vivian Berger
99 Hudson Street
New York, New York 10013
(212) 219-1900

ROBERT H. STROUP 141 Walton Street Atlanta, Georgia 30303 \*Attorney of Record

PRESS OF RAM PRINTING, HYATTSVILLE, MD 20781 (301) 864-6662

125/14

#### QUESTIONS PRESENTED

- 1. To make out a prima facie case under the Equal Protection Clause of the Fourteenth Amendment, must a condemned inmate alleging racial discrimination in a State's application of its capital sentencing statutes present statistical evidence "so strong as to permit no inference other than that the results are a product of racially discriminatory intent or purpose?"
- 2. Is proof of intent to discriminate a necessary element of an Eighth Amendment claim that a State has applied its capital statutes in an arbitrary, capricious and unequal manner?
- 3. Must a condemned inmate present specific evidence that he was personally discriminated against in order to obtain either Eighth or Fourteenth Amendment relief on the grounds that he was

sentenced to die under a statute administered in an arbitrary or racially discriminatory manner?

- 4. Does a proven racial disparity in the imposition of capital sentences, reflecting a systematic bias against black defendants and those whose victims are white, offend the Eighth or Fourteenth Amendments irrespective of its magnitude?
- 5. Does an average 20-point racial disparity in death-sentencing rates among that class of cases in which a death sentence is a serious possibility so undermine the evenhandedness of a capital sentencing system as to violate the Eighth or Fourteenth Amendment rights of a death-sentenced black inmate?

#### TABLE OF CONTENTS

QUESTIO	NS PR	RESEN	TEI									•	1
CITATIO	NS TO	OPI	NIC	ONS	BE	ELC	W						1
JURISDI	CTION	٠.											2
CONSTIT	UTION	AL P	ROV	/IS	ION	IS	IN	IV C	LV	ED			2
STATEME	NT OF	THE	C	ASE									2
A.	Cou	rse	of	Pro	oce	e	lin	gs					2
В.	Pet	itio	ner	's	Ev	ric	len	ce	0	f			
	Ra	cial	Di	sci	rin	ir	nat	io	n:	T	he		
	Ва	ldus	St	ud:	ies	3				•	•		7
c.	The	Dec	isi	ons	s E	e.	low	,					18
SUMMARY	OF A	RGUM	ENT										23
I. UNCONST CAPITAL		IONA	LC	ONS	SID	EF	TAS	IO	N	IN			32
	Α.	F	lau our ort isc dmi	qualise testinate inis	Of ent R in	h	he Am ia io	en 1 n	dm In Of	en T	t he		32
	В.		roh	ibi	its	F	lac	ia	1	Bi	as		41

II. THE COURT OF APPEALS FASHIONED UNPRECEDENTED STANDARDS OF PROOF WHICH FORECLOSE ALL MEANINGFUL REVIEW OF RACIAL

Α.	The Court of Appeals	
	Ignored This Court's	
	Decisions Delineating	
	A Party's Prima Facie	
	Burden Of Proof Under	
	The Equal Protection	
	Clause	47
ъ.	The Court of Appeals	
	Disregarded This	
	Court's Teachings On	
	The Proper Role Of	
	Statistical Evidence	
	In Proving Intentional	
	Discrimination	64
c.	The Court Of Appeals	
	Erroneously Held That	
	Even Proven	
	Patterns Of Racial	
	Discrimination Will	
	Not Violate The	
	Constitution Unless	
	Racial Disparities Are	
	Of Large Magnitude	77
D.	The Court Of Appeals	
	Erred in Demanding	
	Proof of "Specific	
	Intent To	
	Discriminate" As A	
	Necessary Element Of	
	An Eighth Amendment	-
	Claim	9 1
**** **** ***	UDE CUOULD RESULD CDIVE	
	URT SHOULD EITHER GRANT ELIEF OR REMAND THE CASE	
	OF APPEALS FOR FURTHER	

	CONCLUSION										•	•			110
--	------------	--	--	--	--	--	--	--	--	--	---	---	--	--	-----

## TABLE OF AUTHORITIES

Cases	Pages
Alabama v. Evans, 461 U.S. 230 (1983)	. 95
Alexander v. Louisiana, 405 U.S. 625 (1972)	47,48
Avery v. Georgia, 345 U.S. 559 (1953)	76
Ballew v. Georgia, 435 U.S. 223 (1978)	. 84
Batson v. Kentucky,U.S, 90 L.Ed. 2d 69 (1986)	47,74
Bazemore v. Friday,U.S, 106 S.Ct. 3000 (1986) 27,29,64,73,75,78	8,106
Briscoe v. Lahue, 460 U.S. 325 (1983)	. 38
Brown v. Board of Education, 346 U.S. 483 (1954)	32
Castaneda v. Partida, 430 U.S. 482 (1977) 27,49,56,65,	73,79
Chapman v. California, 386 U.S. 18 (1967)	. 108
Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974)	39,44

Col	ole	v	•	H	ot		S	P	ri	r	ıg	18	1	S	C	h	0	0	1		D	1	S	t	r	1	C	t			
	N	0.	5,	(	68	2	1	F		2	d	1	7	2	1		(	8	t	h											
	C	ir	•	19	98	2	)		• •						•	•		•		•	•	•		•		•	•	•			66
Eas	stl	and	1	v		T	V	A	,																						
	7	04	F	•	2	d		6	13	3	(	1	1	t	h		C	i	r			1	9	8	3	)	•	•		-	66
Edd	lin	gs	v		0	k	1	al	no	on	ıa	١,																			
		55												2	)		•		•	•	•			•	•		•				98
EEC	oc ·	v.	В	a.	11		C	01	r	٠.	,																				
	6	61	F		2	d		53	3 1	L	(	6	t	h		C	i	r			1	9	8	1	)					(	66
Fui	rma	n 1	<b>v</b> .	(	3e	0	r	g	ia	١,																					
	4	80	U	. 5	S.		2	38	8																						
	(	19	72	)		•	•	•			•	•	•	•	•			2	4	,	3	1	,	4	1	,	9	7	, :	1 (	7
Gai	rdn	er	v		F	1	0	r	ić	la	ι,																				
	4	30	U	. 5	3.		3	4 9	9	(	1	9	7	7	)		•	•	•	•	•	•	•		4	4	,	9	8	, 5	99
Ger	ner																														
		nc.																													
	3	75	(	19	8	3	)	• •			•	•	•	•	•	•	•				•		•		•	•		•		*	34
Gig	gli	0 1	7.	τ	Jn	i	t	ec	1	S	t	a	t	e	S	,															
	4	05	U	. 5	3.		1	50	)	(	1	9	7	2	)	•		•	•			•	•	•	•	•	•	•			4
God	lfr										١,																				
		46																													
	(:	198	30	) .		•	•	• •		•	•	•	•	•	•				2	5	,	3	1	,	4	2	,	5	7	, 9	8
	ve																														
	4	05	U	. 5	3.		1:	20	) 1		(	1	9	7	2	)	•	•		•	•	•	•		•	•		•		9	95
Gre	gg																														
		28											_	_			_			_		_	_		_						
	(	197	76	) .		•	•	• •		•	•	•	2	5	•	4	0	,	4	2		5	7	,	5	9	,	8	9	, 9	8
Haz	el																														
	S	tat	е	s,	•	4	3	3	U		S			2	9	9		(	1	9	7	7	)	•	•	•	•	•		•	5
Но	Ah																														
	(1	No.		0	4	0	)	(	C		C			D			C	a	1			1	8	I	9	)				3	34

Hunter v. Underwood,U.S, 85 L. Ed. 2d 222	
(1985)	1
(1300)	
Jones v. Georgia,	
389 U.S. 24 (1967) 48	3
·	
Loving v. Virginia, 388 U.S. 1 (1967) 39	5
366 0.3. 1 (1901)	•
Lyons v. Oklahoma,	
322 U.S. 596 (1944) 108	3
McClesky v. State, 245 Ga. 108, 263	
S.E. 2d 14, cert. denied, 449	
U.S. 891 (1980)	5
McCleskey v. Zant,	
454 U.S. 1093 (1981)	5
McLaughlin v. Florida,	
379 U.S. 184	
(1964)	)
Mr. Waslahu Gian Based of Bins	
Mt. Healthy City Board of Educ. v. Doyle, 429 U.S. 274 (1977)107,108	2
Doyle, 425 0.0. 214 (1511)101,100	
Neal v. Delaware, 100 U.S. 370	
(1881)	)
Nixon v. Herndon, 273 U.S. 536	
(1927)	3
,,	
Papasan v. Allain,U.S, 106 S.Ct. 2932 (1986) 29,78	
106 S.Ct. 2932 (1986) 29,78	3
Parker v. North Carolina,	
397 U.S. 790 (1970) 108	3
,	
Patton v. Mississippi,	
332 U.S. 463 (1947) 76	5
Personnel Administrator of	
Massachusetts v. Feenev.	

442 U.S. 256 (1976)	35,74
Rhodes v. Chapman, 452 U.S. 337 (1981)	99
Roe v. Wade, 410 U.S. 113 (1973)	39,43
Rogers v. Lodge, 458 U.S. 613 (1982)	50,60
Rose v. Mitchell, 443 U.S. 545 (1979)	33
Rozecki v. Gaughan, 459 F. 2d 6 (1st Cir. 1972)	99
Segar v. Smith, 738 F. 2d 1249 (D.C. Cir. 1984)	66,76
Skinner v. Oklahoma, 316 U.S. 535 (1942)	39
Skipper v. South Carolina,U.S, 90 L. Ed. 2d 1 (1986)	104
Smith v. Texas, 311 U.S. 128 (1940)	32,45
Spain v. Procunier, 600 F. 2d 189 (9th Cir. 1979)	
Stanley v. Illinois, 405 U.S. 645 (1972)	39,44
Strauder v. West Virginia, 100 U.S. 303 (1880)	34,41
Sullivan v. Wainwright, 464 U.S. 10 (1983)	
Teamsters v. United States, 431 U.S. 324 (1977)	. 65

rexas Dep t of Community Affairs v.
Burdine, 450 U.S. 248
(1981)
Turner v. Murray,U.S,
90 L. Ed. 2d 27
(1986) 24,33,56,76,103
Vasquez v. Hillery,U.S,
88 L. Ed. 2d 598
(1986)
Village of Arlington Heights v.
Metropolitan Housing Development
Corp., 429 U.S. 252
(1977)
Vuyanich v. Republic National Bank,
505 F. Supp. 224 (N.D. Tex.
1980) vacated on other grounds,
732 F. 2d 1195 (5th Cir.1984) 66
Wainwright v. Adams, 466 U.S. 564
(1984) 93
Wainwright v. Ford, 467 U.S. 1220
(1984) 93
Washington v. Davis,
426 U.S. 229
(1976)
Wayte v. United States,U.S,
84 L. Ed. 2d 547 (1985) 49
Whitus v. Georgia, 385 U.S. 545
(1967)

WIIK																												
	554																											
7	Jac	ate	ed	. 8	an	d	r	e	m	al	nd	le	d		0	n		0	t	h	e	r						
2	ro	uno	ds	,	4	59	9	U	. :	S	•	8	0	9		(	1	9	8	2	)			•	•		6	6
Wolfe																												
2	2 Ga	a.	A	p	9.	4	19	9	,				. ,		5	8		S		E			8	9	9			
(	190	07	) .			•								•	•	•	•		•		•	•					6	51
Wong	Sui	n 1	v .	τ	Jn	it	te	d		Si	ta	it	е	s	,													
3	371	U	. S	•	4	7:	1	(	1	96	63	1)															10	8
Yick	Wo	v		Н	p	k:	in	s	,																			
1	118	U	. S		3	56	5	(	1	88	36	( )													3	3	, 5	6
Zant	v.	Si	te	ph	ne	ns	s,		4	62	2	U		S			8	6	2									
	198			_																					4	3	, 5	7
Zant	v.	Si	te	ph	ne	ns	s ,		4	56	6	U		S			4	1	0									
	198			_																							4	3
Statu	ites	5																										
28 U.	s.c		5	1	2	54		(	1	) .		•						•	•		*		•	•	•			2
28 U.	s.c	<b>.</b>	9	2	22	41	L	(	C	)	(	3	)	•						•			•			,	10	16
Rule	406	5,	F		R	u]	le		E	7 3	id											•					7	2
Forme																												
(	b) (	(2)						•				•	•				٠			•		*	•					5
Forme	r	Ga.		Cc	od	e	A	n	n.		5		2	7	_	2	5	3	4		1							
(	b) (	(8)							• •				*												•			5

## Other Authorities

D. Baldus & J. Cole, Statistical

Proof of Discrimination (1980) 8
Baldus, Pulaski & Woodworth,
Arbitrariness and Discrimination
in the Administration of the
Death Penalty: A Challenge to State
Supreme Courts, 15 Stetson L.
Rev. 133 (1986)8
Rev. 100 (1900)
Baldus, Pulaski & Woodworth,
Comparative Review of Death
Sentences: An Empirical Study of
the Georgia Experience, 74 J.
Crim. Law & Criminology 661
(1983)
Baldus, Pulaski, Woodworth & Kyle,
Identifying Comparatively
Excessive Sentences of Death: A
Quantitative Approach, 33 Stan.
L. Rev. 1 (1977) 8
Baldus, Woodworth & Pulaski,
Monitoring and Evaluating
Contemporary Death Sentencing
Systems: Lessons from Georgia,
18 U.C. Davis L. Rev. 1375
(1985)
Barnett, Some Distribution Patterns
for the Georgia Death Sentence,
18 U.C. Davis L. Rev. 1327
(1985)
Bentele, The Death Penalty in Georgia:
Still Arbitrary, 61 Wash. U.L.Q.
573 (1985)
313 (1303)
Bowers & Pierce, Arbitrariness and
Discrimination Under Post-Furman
Capital Statutes, 26 Crime &
Deling. 563 (1980) 51
Finkelstein, The Judicial Reception of

Multiple Regression Studies in Race
and Sex Discrimination Cases, 80
Colum. L. Rev. 737 (1980) 66
Fisher, Multiple Regression in Legal
Proceedings, 80 Colum. L. Rev. 737
(1980) 66
Gross, Race and Death: The Judicial
Evaluation of Evidence of
Discrimination in Capital
Sentencing, 18 U.C. Davis L. Rev.
1275 (1985)81,90
Gross & Mauro, Patterns of Death:
Disparities in Capital Sentencing
and Homicide Victimization, 37
Stan. L. Rev. 27 (1985) 51
H. Kalven & H. Zeisel, The American
<u>Jury</u> (1966) 84
B. Nakell & K. Hardy,
The Arbitrariness of the Death
Penalty, (1986)
(forthcoming)
Report of the Joint Committee on
Reconstruction at the First
Session, Thirty-Ninth Congress,
(1866)
Statement of Rep. Thaddeus Stevens,
Cong. Globe, 39th Cong., 1st
Sess. 2459 (1966); Accord,
statement of Sen. Pollard, Cong.
Globe, 39th Cong., 1st Sess.
2961 (1866)
Wolfgang & Riedel, Race, Judicial
Discretion and the Death Penalty,
407 Annals 119 (May 1973) 51
Wolfgang & Riedel, Race, Rape, and the

Death	Penalty	in G	eorgia	,	45	A	m.	J.
Orthor	sychiat.	658	(1975	) .				51

No. 84-6811

#### IN THE

# SUPREME COURT OF THE UNITED STATES October Term, 1985

WARREN McCLESKEY.

Petitioner,

- v.-

RALPH M. KEMP, Superintendent, Georgia Diagnostic & Classification Center.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

#### BRIEF FOR PETITIONER

#### CITATIONS TO OPINIONS BELOW

The opinion of the United States

Court of Appeals for the Eleventh

Circuit is reported at 753 F.2d 877

(11th Cir. 1985)(en banc). The opinion

of the United States District Court for

the Northern District of Georgia is

reported at 580 F. Supp. 338 (N.D. Ga.

1984).

#### JURISDICTION

The judgment of the Court of Appeals was entered on January 29, 1985. A timely motion for rehearing was denied on March 26, 1985. The Court granted certiorari on July 7, 1986. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

# CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Eighth and the Fourteenth Amendments to the Constitution of the United States.

#### STATEMENT OF THE CASE

## A. Course of Proceedings

Petitioner Warren McCleskey is a young black man who was tried in the Superior Court of Fulton County, Georgia, for the murder of a white police officer, Frank Schlatt. The homicide occurred on May 13, 1978 during an armed robbery of the Dixie Furniture

Store in Atlanta. In a statement to police, petitioner admitted that he had been present during the robbery, but he denied that he had fired the shot that killed Officer Schlatt. (Tr.T. 453).1

Petitioner was tried by a jury comprised of eleven whites and one black. (Fed.Tr.1316). The State's case rested principally upon certain disputed forensic and other circumstantial evidence suggesting that petitioner may have fired the murder weapon, and upon

Each reference to the trial transcript will be indicated by the abbreviation "Tr.T," and to the federal habeas corpus transcript, by the abbreviation "Fed.Tr."

References to the Joint Appendix will be indicated by the abbreviation "J.A." and to the Supplemental Exhibits, "S.E." by Petitioner's exhibits submitted to the District Court during the federal hearing were identified throughout the proceedings by the initials of the witness during whose testimony they were introduced, followed by an exhibit number. For example, the first exhibit introduced during the testimony of Professor David Baldus was designated "DB 1."

purported confessions made to a codefendant and to a cellmate, Offie Evans.  $^2$ 

The Court of Appeals reversed, holding that the detective's promises to witness Evans were insufficiently substantial to require full disclosure under Giglio, and that any errors in concealing the promises were harmless. (J.A.242-44). Five judges dissented, contending that Giglio had plainly been violated; four of the five also believed that the concealed promise was not

<sup>2</sup> The co-defendant, Ben Wright, had a possible personal motive to shift responsibility from himself to petitioner. Inmate Evans testified petitioner. without any apparent self-interest that petitioner had boasted to him in the cell about shooting Officer Schlatt. However, the District Court later found Evans had concealed from petitioner's jury a detective's promise of favorable treatment concerning pending federal charges. Holding that this promise was "within the scope of Giglio [v. United States, 405 U.S. 150 (1972)]," (J.A.188), the District Court granted petitioner habeas corpus relief: "[G]iven the circumstantial nature of the evidence that McCleskey was the triggerman who killed Officer Schlatt and the damaging nature of Evans' testimony as to this issue and the issue of malice . . . the jury may reasonably have reached a different verdict on the charge of malice murder had the promise of favorable treatment been disclosed." (J.A.190).

The jury convicted petitioner on all charges. Following the penalty phase, it returned a verdict finding two aggravating circumstances 3 and recommending a sentence of death. On October 12, 1978, the Superior Court imposed a death sentence for murder and life sentences for armed robbery. (J.A.112). After his convictions and sentences had been affirmed on direct appeal, McClesky v. State, 245 Ga. 108, 263 S.E.2d 146, cert. denied, 449 U.S. 891 (1980), petitioner filed a petition for habeas corpus in the Superior Court of Butts County, alleging, inter alia,

harmless. (J.A.287-89) (Godbold, Ch.J., dissenting in part); id. at 286; (Kravitch, J., concurring).

The jury found that the murder had been committed during an armed robbery, former Ga. Code Ann. § 27-2534.1(b)(2)(current version 0.C.G.A. § 17-10-30(b)(2)), and that it had been committed against a police officer. Former Ga. Code Ann. § 27-2534.1(b)(8)(current version 0.C.G.A. § 17-10-30(b)(8)).

that he had been condemned pursuant to capital statutes which were being "applied arbitrarily, capriciously and whimsically" in violation of the Eighth Amendment (State Habeas Petition, ¶ 10), and in a "pattern . . . to discriminate intentionally and purposefully on grounds of race," in violation of the Equal Protection Clause. (Id. ¶ 11). The Superior Court denied relief on April 8, 1981.

After unsuccessfully seeking review from the Supreme Court of Georgia and this Court, see McCleskey v. Zant, 454 U.S. 1093 (1981)(denying certiorari), petitioner filed a federal habeas corpus petition reasserting his claims of systemic racial discrimination and arbitrariness. (Fed. Habeas Pet. ¶¶ 45-50; 51-53). The District Court held an evidentiary hearing on these claims in August of 1983.

The evidence presented by petitioner at the federal hearing is integrally related to the issues now on certiorari. In the next section, we will summarize that evidence briefly; fuller discussion will be included with the legal arguments as it becomes relevant.

B. Petitioner's Evidence of Racial Discrimination: The Baldus Studies

Petitioner's principal witness at the federal habeas hearing was Professor David C. Baldus, one of the nation's leading experts on the legal

<sup>4</sup> Discussion of the research design of the Baldus studies appears at pp. 50-55 <u>infra</u>. Statistical methods used by Professor Baldus and his colleagues are described at pp. 66-71. The principal findings are reviewed at pp. 80-89.

A more detailed description of the research methodology of the Baldus studies -- including study design, questionnaire construction, data sources, data collection methods, and methods of statistical analysis -- can be found in Appendix E to the Petition for Certiorari, McCleskey v. Kemp, No. 84-6811.

use of statistical evidence. 5
Professor Baldus testified concerning
two meticulous and comprehensive studies
he had undertaken with Dr. George
Woodworth 6 and Professor Charles

<sup>5</sup> Professor Baldus is the coauthor of an authoritative text in the field, D.Baldus & J. Cole, Statistical Proof of Discrimination (1980), as well as a number of law review articles relevant to his testimony in this case. Baldus, Pulaski, Woodworth & Kyle, Identifying Comparatively Excessive Sentences of Death, 33 Stan. L. Rev. 601 (1980); Baldus, Pulaski & Woodworth, Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience, 74 J. Crim. Law & Criminology 661 (1983); Baldus, Woodworth & Pulaski, Monitoring and Evaluating Contemporary Death Sentencing Systems: Lessons From Georgia, 18 U.C. Davis L. Rev. 1374 (1985); Baldus, Pulaski & Woodworth, Arbitrariness and Discrimination in the Administration of the Death Penalty: A Challenge to State Supreme Courts, 15 Stetson L. Rev. 133 (1986).

<sup>6</sup> Dr. Woodworth is Associate Professor of Statistics at the University of Iowa and the founder of Iowa's Statistical Consulting Center. (Fed.Tr.1203-04). He has consulted on statistical techniques for over eighty empirical studies (id. 1203-04) and has taught and written widely on statistical issues. (GW 1).

Pulaski. Professor Baldus explained that he had undertaken the studies to examine Georgia's capital sentencing experience under its post-Furman statutes. The studies drew from a remarkable variety of official records on Georgia defendants convicted of murder and voluntary manslaughter, to which Professor Baldus obtained access through the cooperation of the Georgia Supreme Court, the Georgia Board of

<sup>&</sup>lt;sup>7</sup> Professor Charles A. Pulaski, Jr., is Professor of Law at Arizona State University College of Law, specializing in criminal procedure. Professor Pulaski did not testify during the federal hearing.

Petitioner also presented expert testimony from Dr. Richard A. Berk, Professor of Sociology and Director of the Social Process Research Institute at the University of California at Santa Barbara, and a nationally prominent expert on research methodology, especially in the area of criminal justice research. He was a member of the National Academy of Sciences' Committee on Sentencing Research. Dr. Berk gave testimony evaluating the appropriateness of Baldus' method and the significance of his findings.

Pardons and Paroles, and other state agencies. These records included not only trial transcripts and appellate briefs but also detailed parole board records, prison files, police reports and other official documents. (S.E. 43).

Using a carefully tailored questionnaire, Professor Baldus gathered over five hundred items of information on each case concerning the defendant, the victim, the crime, the aggravating and mitigating circumstances, and the strength of the evidence. In addition, the Baldus questionnaire required researchers to prepare a narrative summary to capture individual features of each case. The full questionnaire appears as DB 38 in the Supplemental Exhibits. (S.E. 1-42). Employing generally accepted data collection methods at each step, Professor Baldus cross-checked the accuracy of the data both manually and by computer-aided systems. (Fed.Tr.585-616).

Professor Baldus found that during the 1973-1979 period, 2484 murders and non-negligent manslaughters occurred in the State of Georgia. Approximately 1665 of those involved black defendants; 819 involved white defendants. Blacks were the victims of homicides in approximately 61 percent of the cases, whites in 39 percent. When Professor Baldus began to examine the State's subsequent charging and sentencing patterns, however, he found that the racial proportions were heavily inverted. Among the 128 cases in which a death sentence was imposed, 108 or 87% involved white victims. As exhibit DB 62 demonstrates, white victim cases were nearly eleven times more likely to receive a sentence of death than were black victim cases. (S.E. 46). When the

cases were further subdivided by race of defendant, Professor Baldus discovered that 22 percent of black defendants in Georgia who murdered whites were sentenced to death, while scarcely 3 percent of white defendants who murdered blacks faced a capital sentence. (S.E. 47).

These unexplained racial disparities prompted Professors Baldus and Woodworth to undertake an exhaustive statistical inquiry. They first defined hundreds of variables, each capturing a single feature of the cases. Using various statistical models, each comprised of selected groups of different variables (see F.d. Tr. 689-705), Baldus and Woodworth tested whether other

<sup>&</sup>lt;sup>8</sup> For example, one variable might be defined to reflect whether a case was characterized by the presence or absence of a statutory aggravating circumstance, such as the murder of a police victim. (See Fed.Tr.617-22).

characteristics of Georgia homicide cases might suffice to explain the racial disparities they had observed. Through the use of multiple regression analysis, Baldus and Woodworth were able to measure the independent impact of the racial factors while simultaneously taking into account or controlling for more than two hundred aggravating and mitigating factors, strength of evidence factors, and other legitimate sentencing considerations. (See, e.g., S.E. 51).

Professors Baldus and Woodworth subjected the data to a wide variety of statistical procedures, including cross-tabular comparisons, weighted and unweighted least-squares regressions, logistic regressions, index methods, cohort studies and other appropriate scientific techniques. Yet regardless of which of these analytical tools Baldus and Woodworth brought to bear,

race held firm as a prominent determiner of life or death. Race proved no less significant in determining the likelihood of a death sentence than aggravating circumstances such whether the defendant had a prior murder conviction or whether he was the prime mover in the homicide. (S.E. 50). Indeed, Professor Baldus testified that his best statistical model, which "captured the essence of [the Georgia] . . . system" (Fed.Tr.808), revealed that after taking into account most legitimate reasons for sentencing distinctions, the odds of receiving a death sentence were still more than 4.3 times greater for those whose victims were white than for those whose victims were black. (Fed.Tr. 818; DB 82). Focusing directly on petitioner's case, Baldus and his colleagues estimated that for homicide cases "at Mr. McCleskey's level of aggravation the average white victim case has approximately a twenty [20] percentage point higher risk of receiving a death sentence than a similarly situated black victim case."

(Id. 1740).9 Professor Baldus also testified that black defendants whose victims were white were significantly more likely to receive death sentences than were white defendants, especially among cases of the general nature of

These figures represent a twenty percentage point, not a twenty percent, increase in the likelihood of death. Among those cases where the average death-sentencing rate is .24 or 24-in-100, the white-victim rate would be approximately .34 or 34-in-100, the black-victim rate, only .14, or 14-in-100. This means that the sentencing rate in white victim cases would be over twice as high (.34 vs. .14) as in black victim cases. Thus, on the average, among every 34 Georgia defendants sentenced to death at this level of aggravation for the murders of whites, 20 would likely not have received a death sentence had their victims been black.

petitioner's. (Fed.Tr. 863-64).

Professor Baldus demonstrated that this "dual system" of capital sentencing was fully at work in Fulton County where petitioner had been tried and sentenced Not only did county to death. statistical patterns replicate the statewide trends, but several nonstatistical comparisons of Fulton County cases further emphasized the importance of race. For example, among those 17 defendants who had been charged with homicides of Fulton County police officers between 1973 and 1980, only one defendant other than petitioner had even received a penalty trial. In that case, where the victim was black, a life sentence was imposed. (Fed.Tr.1050-62).

The State of Georgia produced little affirmative evidence to rebut petitioner's case. It offered no alternative model that might have

reduced or eliminated the racial variables. (Fed. Tr. 1609). It did not even propose, much less test the effect of, additional factors concerning Georgia crimes, defendants or victims, admitting that it did not know whether such factors "would have any effect or not." (Id. 1569). The State expressly declined Professor Baldus's offer, during the hearing, to employ statistical procedures of the State's choice in order to calculate the effect of any factors the State might choose to designate and to see whether the racial effects might be eliminated. 10

Instead, the State simply attacked

Professor Baldus's invitation and designated a statistical model it believed would most accurately capture the forces at work in Georgia's capital sentencing system. (Fed. Tr. 810; 1426; 1475-76; 1800-03; Court's Exhibit 1). After analyzing this model, Professor Baldus reported that it did nothing to diminish the racial disparities. (See R. 731-52).

the integrity of Professor Baldus's data sources (see Fed. Tr. 1380-1447), its own official records. It also presented one hypothesis, that the apparent racial disparities could be explained by the generally more aggravated nature of white victim cases. The State's principal expert never tested that hypothesis by any accepted statistical techniques (id. 1760-61), although he admitted that such a test "would . . .[have been] desirable." (Id. 1613). Professors Baldus and Woodworth did test the hypothesis and testified conclusively on rebuttal that it could not explain the racial disparities. (Fed.Tr.1290-97; 1729-32; GW 5-8).

## C. The Decisions Below

The District Court rejected petitioner's claims. It faulted petitioner's extraordinary data sources because they had "not capture[d] every

nuance of every issue." (J.A.136). The extensive Parole Board records, the court complained, "present a retrospective view of the facts and circumstances . . . after all investigation is completed, after all pretrial preparation is made." (J.A.146). Since such files, the court reasoned, did not measure the precise quanta of information available to each decision maker -- police, prosecutor, judge, jury -- at the exact moment when different decisions about the case were made, "the data base . . . is substantially flawed." (Id.) As a related matter, the District Court insisted that all of Professor Baldus's statistical models of the Georgia system --- even those employing more than 230 separate variables -- were "insufficiently predictive" since they did not include every conceivable

variable and could not predict every case outcome. (J.A.147).

The District Court ended its opinion by rejecting the legal utility of such statistical methods altogether:

[M]ultivariate analysis is ill suited to provide the court with circumstantial evidence of the presence of discrimination, and it is incapable of providing the with measures court difference in qualitative treatment which are necessary to a finding that a prima facie case has been established . . . To the extent that McCleskey contends that he was denied . . equal protection of the law, his methods fail to contribute anything of value to his cause.

(J.A.168-69)(italics omitted).

The majority of the Court of Appeals chose not to rest its decision on these findings by the District Court; instead it expressly "assum[ed] the validity of the research" and "that it proves what it claims to prove." (J.A.246). Yet the Court proceeded to announce novel standards of proof that foreclose any

meaningful review of racial claims like petitioner's. As its baseline, the Court held that statistical proof of racial disparities must be "sufficient to compel a conclusion that it results from discriminatory intent and purpose." (J.A.259) (emphasis added). "[S]tatistical evidence of racially disproportionate impact [must be] . . . so strong as to permit no inference other than that the results are the product of a racially discriminatory intent or purpose." (J.A.250). The Court also announced that even unquestioned proof of racially discriminatory sentencing results would not suffice to make out an Equal Protection Clause violation unless the racial disparities were of sufficient magnitude: "The key to the problem lies in the principle that the proof, no matter how strong, of some disparity is alone insufficient."

(J.A.259). "In any discretionary system, some imprecision must be tolerated," the Court stated, and petitioner's proven racial disparities were "simply insufficient to support a ruling . . . that racial factors are playing a role in the outcome sufficient to render the system as a whole arbitrary and capricious." (J.A.268). Finally, the majority held that no Eighth Amendment challenge based upon race could succeed absent similar proof of purposeful State conduct. Although "cruel and unusual punishment cases do not normally focus on the intent of the government actor . . . where racial discrimination is claimed . . . then purpose, intent and motive are a natural component of the proof" (J.A.257) and "proof of a disparate impact alone is insufficient . . unless . . . it compels a conclusion that . . . race is intentionally being used as a factor in sentencing." (J.A.258).

## SUMMARY OF ARGUMENT

The principal questions before the Court on certiorari involve intermediate issues of evidence and proof. Fundamental constitutional values are nonetheless at the heart of this appeal. Our primary submission is that the lower courts, by their treatment of petitioner's evidence, have effectively placed claims of racial discrimination in the death penalty -- no matter how thoroughly proven -- beyond effective judicial review. To appreciate the impact of the lower court's holding, it is necessary at the outset to recall the constitutional values at stake.

This country has, for several decades, been engaged in a profound national struggle to rid its public life of the lingering influence of official,

state-sanctioned racial discrimination. The Court has been especially vigilant to prevent racial bias from weighing in the scales of criminal justice. See, e.g., Batson v. Kentucky, U.S., 90 L.Ed.2d 69 (1986); <u>Turner v. Murray</u>, \_\_U.S.\_\_, 90 L.Ed.2d 27, 35 (1986); Vasquez v. Hillery, U.S., 88 L.Ed.2d 598 (1986). A commitment against racial discrimination was among the concerns that led the Court to scrutinize long-entrenched capital sentencing practices and to strike down statutes that permitted arbitrary or discriminatory enforcement of the death penalty. See, e.g., Furman v. Georgia, 408 U.S. 238 (1972).

In 1976, reviewing Georgia's then new post-<u>Furman</u> capital statutes, the Court declined to assume that the revised sentencing procedures would inevitably fail in their purpose to

eliminate "the arbitrariness and capriciousness condemned by Furman." Gregg v. Georgia, 428 U.S. 153, 198 (1976)(opinion of Stewart, Powell & Stevens, J.J.). Accord, id. at 220-26 (opinion of White, J.); see also Godfrey v. Georgia, 446 U.S. 420, 428 (1980). It was appropriate at that time for the Court to clothe Georgia's new statutes with a strong presumption of constitutionality -- to assume, "[a]bsent facts to the contrary," Gregg v. Georgia, 428 U.S. at 225 (opinion of White, J.), that its statutes would be administered constitutionally: to reject "the naked assertion that the effort is bound to fail." Id. at 222. Yet the presumption extended to Georgia in 1976 was not -- and under the Constitution could never have been -- an irrevocable license to carry out capital punishment arbitrarily and discriminatorily in

practice.

Petitioner McCleskey has now presented comprehensive evidence to the lower courts that Georgia's post-Furman experiment has failed, and that its capital sentencing system continues to be haunted by widespread and substantial racial bias.

Faced with this overwhelming evidence, the Court of Appeals took a wrong turn. It accorded Georgia's death-sentencing statutes what amounts to an irrebuttable presumption of validity, one no capital defendant could ever overcome. It did so through a series of rulings that "placed on defendants a crippling burden of proof."

Batson v. Kentucky, 90 L.Ed.2d at 85.

Henceforth, a capital defendant, rather than proving a prima facie case of discrimination by demonstrating the presence of substantial racial

disparities within a system "susceptible of abuse" -- thereby shifting the burden of explanation to the State, see, e.g., Castaneda v. Partida, 430 U.S. 482, 494-495 (1977); Washington v. Davis, 426 U.S. 229, 241 (1976); Batson v. Kentucky, supra -- must present proof so strong that it "permits no inference other than . . . racially discriminatory intent. No room is left in this formulation for proof by ordinary factfinding processes. Instead, a capital defendant must anticipate and exclude at the outset "every possible factor that might make a difference between crimes and defendants, exclusive of race." (J.A.261).

This new standard for proof of racial discrimination has no precedent in the Court's teachings under the Equal Protection Clause; it is contrary to everything stated or implied in

Batson v. Kentucky, supra; Bazemore v.

Friday, \_U.S.\_\_, 106 S.Ct. 3000 (1986);

Arlington Heights v. Metropolitan

Housing Development Corp., 429 U.S. 252

(1977), and a host of the Court's

decisions expounding the principle of a

prima facie case.

Compounding the Court of Appeals' new standard is the burden it imposed upon statistical modes of proof, which virtually forecloses any demonstration of discriminatory capital sentencing by means of scientific evidence. To be sufficient, a statistical case must address not only the recognized major sentencing determinants, but also a host of hypothetical factors, conjectured by the Court, whose systematic relation to demonstrated racial disparities is dubious to say the least. (See J.A.271). This cannot be the law, unless there is to be a "death penalty exception" to the Equal Protection Clause. Just last Term, the Court unanimously held that such a restrictive judicial approach to statistical evidence was unacceptable error. Bazemore v. Friday, 106 S.Ct. at 3009. See also Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 252 (1981).

The Court of Appeals also concluded that even proven, persistent racial disparities in capital sentencing are constitutionally irrelevant unless their magnitude is great. This holding strays far from the Constitution and the record. The Equal Protection Clause protects individuals against a little state-sanctioned racial discrimination as well as a lot; the law does not permit a State to use the death penalty infrequently, or discriminate when it does, and defend by saying that this discrimination is rare. Only last Term,

in Papasan v. Allain, \_U.S.\_\_, 106
S.Ct. 2932 (1986), the Court expressly
declined to apply "some sort of
threshold level of effect . . . before
the Equal Protection Clause's strictures
become binding."

In any event, the Court of Appeals plainly misconceived the facts as much as the law on this issue. As we will show, one central flaw pervading its decision was a serious misapprehension of the degree to which race played a part in Georgia's capital sentencing system from 1973 through 1979.

Finally, the court announced that, henceforth, in a capital case, proof of "purposeful discrimination will be a necessary component of any Eighth Amendment claim alleging racial discrimination." Such a rule contradicts both precedent and principle. Under the Eighth Amendment,

this Court has held that it is the State's obligation "to tailor and apply its laws in a manner that avoids the arbitrary and capricious infliction of the death penalty." Godfrey v. Georgia, 446 U.S. 420, 428 (1980). The federal task in reviewing the administration of those laws "is not restricted to an effort to divine what motives impelled the[] death penalties," Furman v. Georgia, 408 U.S. at 253 (Douglas, J., concurring), but, having "put to one side" the issue of intentional discrimination, id. at 310 (Stewart, J., concurring), to discern whether death sentences are "be[ing] . . . wantonly and . . . freakishly imposed." Id. at 312.

Reduced to its essence, petitioner's submission to the Court is a simple one. Evidence of racial discrimination that would amply suffice if the stakes were a

job promotion, or the selection of a jury, should not be disregarded when the stakes are life and death. Methods of proof and fact-finding accepted as necessary in every other area of law should not be jettisoned in this one.

I.

## RACE IS AN INVIDIOUS AND UNCONSTITUTIONAL CONSIDERATION IN CAPITAL SENTENCING PROCEEDINGS

A. The Equal Protection Clause Of The Fourteenth Amendment Forbids Racial Discrimination In The Administration Of Criminal Statutes

In the past century, few judicial responsibilities have laid greater claim on the moral and intellectual energies of the Court than "the prevention of official conduct discriminating on the basis of race." Washington v. Davis, 426 U.S. at 239. The Court has striven to eliminate all forms of statesanctioned discrimination, "whether accomplished ingeniously or ingenuously." Smith v. Texas, 311 U.S.

128, 132 (1940). It has forbidden discrimination required by statute, see, e.g., Brown v. Board of Education, 346 U.S. 483 (1954); Nixon v. Herndon, 273 U.S. 536 (1927), and has not hesitated to "look beyond the face of . . . [a] statute . . . where the procedures implementing a neutral statute operate . . . on racial grounds." Batson v. Kentucky, 90 L.Ed.2d at 82; Turner v. Fouche, 396 U.S. 346 (1970); Yick Wo v. Hopkins, 118 U.S. 356, 373-74 (1886).

The Court has repeatedly emphasized that "the core of the Fourteenth Amendment is the prevention of meaningful and unjustified official distinctions based on race." Hunter v. Erickson, 393 U.S. 385, 391 (1969). In the area of criminal justice, where racial discrimination "strikes at the fundamental values of our judicial system and our society as a whole," Rose

v. Mitchell, 443 U.S. 545, 556 (1979), the Court has "consistently" articulated a "strong policy . . . of combating racial discrimination." <u>Id</u>. at 558.

One of the most obvious forms that such discrimination can take in the criminal law is a systematically unequal treatment of defendants based upon their race. See McLaughlin v. Florida, 379 U.S. 184, 190 n.8 (1964), citing Strauder v. West Virginia, 100 U.S. 303, 306-08 (1880); Ho Ah Kow v. Nunan, 12 Fed. Cas. 252 (No. 6546)(C.C.D.Cal. 1879). Certainly, among the evils that ultimately prompted the enactment of the Fourteenth Amendment and cognate post-Civil War federal legislation were state criminal statutes, including the infamous Black Codes, which prescribed harsher penalties for black persons than for whites. See General Building Contractors Ass'n., Inc. v. Pennsylvania, 458 U.S. 375, 386-87 (1982). 11 In this case, Professor Baldus has reported that the race of the defendant -- especially when the defendant is black and the victim is white -- influences Georgia's capital sentencing process. The State of Georgia has disputed the truth of this claim, but has offered no constitutional defense if the claim is true. Georgia has never articulated, or even

The Court has accordingly insisted "that racial classifications, especially suspect in criminal statutes, be subjected to the 'most rigid scrutiny' and, if they are ever to be upheld . . . be shown to be necessary the accomplishment of some permissible state objective, independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate." Loving v. Virginia, 388 U.S. 1, 11 (1967). See also Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256, 272 (1979); cf. McLaughlin v. Florida, 379 U.S. at 198 ("I cannot conceive of a valid legislative purpose under our Constitution for a state law which makes the color of a person's skin the test of whether his conduct is a criminal offense")(Stewart, J., concurring).

suggested, any "permissible state interest" that would justify the disproportionate infliction of capital punishment in a discriminatory fashion against black defendants.

Nor has Georgia claimed any constitutional warrant to execute murderers of white citizens at a greater rate than murderers of black citizens. The history of the Equal Protection Clause establishes that race-of-victim discrimination was a major concern of its Framers, just as Professor Baldus has now found that it is a major feature of Georgia's administration of the death penalty. Following the Civil War and immediately preceding the enactment of the Fourteenth Amendment, Southern authorities not only enacted statutes that treated crimes committed against black victims more leniently, but frequently declined even to prosecute persons who committed criminal acts against blacks. When prosecutions did occur, authorities often acquitted or imposed disproportionately light sentences on those guilty of crimes against black persons. 12

<sup>12</sup> See, e.g., Report of the Joint Committee on Reconstruction, at the First Session, Thirty-Ninth Congress, Part II, at 25 (1866)(testimony of commonwealth Tucker, George attorney) (The southern people "have not any idea of prosecuting white men for offenses against colored people; they do not appreciate the idea."); id. at 209 (testimony of Lt. Col Dexter Clapp) ("Of the thousand cases of murder, robbery, and maltreatment of freedmen that have come before me, . . . I have never yet known a single case in which the local authorities or police or citizens made any attempt or exhibited any inclination to redress any of these wrongs or to protect such persons."); id. at 213 (testimony of Lt. Col. J. Campbell); id., Part III, at 141 (testimony of Brevet M.J. Gen. Wagner Swayne) ("I have not known, after six months' residence at the capital of the State, a single instance of a white man being convicted and hung [sic] or sent to the penitentiary for crime against a negro, while many cases of crime warranting such punishment have been reported to me."); id., Part IV, at 76-76 (testimony of Maj. Gen. George Custer).

The congressional hearings and debates that led to enactment of the Fourteenth Amendment are replete with references to this pervasive race-ofvictim discrimination; the Amendment and the enforcing legislation were intended, in substantial part, to stop it. As the Court recently concluded in Briscoe v. Lahue, 460 U.S. 325, 338 (1983), "[i]t is clear from the legislative debates that, in the view of the . . . sponsors, the victims of Klan outrages were deprived of 'equal protection of the laws' if the perpetrators systematically went unpunished." See discussion in Petition for Certiorari, McCleskey v. Zant, No. 84-6811, at 5-7.

Even without reference to the Amendment's history, race-of-victim sentencing disparities violate long-recognized equal protection principles applicable to all forms of state action.

The Court has often held that whenever either "fundamental rights" or "suspect classifications" are involved, state action "may be justified only by a 'compelling state interest'... and... legislative enactments must be narrowly drawn to express only the legitimate state interests at stake."

Roe v. Wade, 410 U.S. 113, 155 (1973); see also Cleveland Board of Education v.

LaFleur, 414 U.S. 632 (1974); Stanley v.

Illinois, 405 U.S. 645 (1972).

Discrimination by the race of victim not only implicates a capital defendant's fundamental right to life, cf. Skinner v. Oklahoma, 316 U.S. 535, 541 (1942), but employs the paradigmatic suspect classification, that of race. In McLaughlin v. Florida, supra, the Court examined a criminal statute which singled out for separate prosecution any black man who habitually occupied a

room at night with a white woman (or vice versa) without being married. The statute, in essence, prosecuted only those of one race whose cohabiting "victims" were of the other race. Finding no rational justification for this race-based incidence of the law, the Court struck down the statute.

The discrimination proven in the present case cannot be defended under any level of Fourteenth Amendment scrutiny. Systematically treating killers of white victims more harshly than killers of black victims can have no constitutional justification. 13 This

v. Georgia, 428 U.S. at 183-84 (1976), at least two "legitimate governmental objectives" for the death penalty-retribution and deterrence. The Court noted that the death penalty serves a retributive purpose as an "expression of society's moral outrage at particularly offensive conduct." 428 U.S. at 183. The race of the victim obviously has no place as a factor in society's expression of moral outrage. Similarly, if the death penalty is meant to deter

would set the seal of the state upon the proposition that the lives of white people are more highly valued than those of black people -- either an "assertion of [the] . . . inferiority" of blacks, Strauder v. West Virginia, 100 U.S. at 308, or an irrational exercise of governmental power in its most extreme form.

#### B. The Eighth Amendment Prohibits Racial Bias In Capital Sentencing

Petitioner McCleskey has invoked the protection of a second constitutional principle, drawn from the Eighth Amendment. One clear concern of both the concurring and dissenting Justices in Furman v. Georgia, 408 U.S. 238 (1972), was the possible discriminatory application of the death penalty at that time. Justice Douglas concluded that

capital crime, it ought to deter such crime equally whether inflicted against black or against white citizens.

the capital statutes before him were "pregnant with discrimination," 408 U.S. at 257, and thus ran directly counter to "the desire for equality . . . reflected in the ban against 'cruel and unusual punishments' contained in the Eighth Amendment." Id. at 255. Justice Stewart lamented that "if any basis can be discerned for the selection of these few sentenced to die, it is the constitutionally impermissible basis of race."14 These observations illuminate the holding of Furman, reaffirmed by the Court in Gregg and subsequent cases, that the death penalty may "not be imposed under sentencing procedures that create[] a substantial risk that it [will] . . . be inflicted in an arbitrary and capricious manner." Gregg

<sup>14</sup> See id. at 364-66 (Marshall, J., concurring); cf. id. at 389 n.12 (Burger, C.J., dissenting); id. at 449-50 (Powell, Jr., dissenting).

v. Georgia, 428 U.S. at 188; Godfrey v.
Georgia, 446 U.S. at 428; Zant v.
Stephens, 456 U.S. 410, 413 (1982)(per curiam).

The Court itself suggested in Zant v. Stephens, 462 U.S. 862, 885 (1983), that if "Georgia attached the 'aggravating' label to factors that are constitutionally impermissible or totally irrelevant to the sentencing process, such as . . . the race . . . of the defendant . . . due process of law would require that the jury's decision to impose death be set aside." This Eighth Amendment principle tracks the general constitutional rule that, where fundamental rights are at stake, "legislative enactments must be narrowly drawn to express only the legitimate state interests at stake." Roe v. Wade, 410 U.S. at 155. Legislative classifications that are unrelated to

any valid purpose of a statute are arbitrary and violative of the Due Process Clause. Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974); Stanley v. Illinois, 405 U.S. 645 (1972). A legislative decision to inflict the uniquely harsh penalty of death along the lines of such an irrational classification would be still more arbitrary under the heightened Eighth Amendment standards of Furman. Cf. Gardner v. Florida, 430 U.S. 349, 357-58, 361 (1977)(plurality opinion); id. at 362-64 (opinion of White, J.). And nothing could be more arbitrary within the meaning of the Eighth Amendment than a reliance upon race in determining who should live and who should die.

# THE COURT OF APPEALS FASHIONED UNPRECEDENTED STANDARDS OF PROOF WHICH FORECLOSE ALL MEANINGFUL REVIEW OF RACIAL DISCRIMINATION IN CAPITAL SENTENCING PROCEEDINGS

The crucial errors of the Court of Appeals involve the "crippling burden of proof" it placed upon petitioner and any future inmate who would seek the protections of the Federal Constitution against racial discrimination in capital sentencing. "[E]qual protection to all," the Court long ago observed, "must be given -- not merely promised." Smith v. Texas, 311 U.S. at 130. The opinion below was all promise, no give. It held, in effect: You can escape being judged by the color of your skin, and by that of your victim, if (but only if) you can survey and capture every ineffable quality of every potentially capital case, and if you then meet standards for statistical analysis that

are elsewhere not demanded and nowhere susceptible of attainment.

Judged by these standards, the research of Professor Baldus-described by Dr. Richard Berk as "far and away the most complete and thorough analysis of sentencing that's ever been done" (Fed.Tr.1766) -- is simply not good enough. Nor would any future studies be, absent evidence that apparently must "exclud[e] every possible factor that might make a difference between crimes and defendants, exclusive of race." (J.A.261). As we shall demonstrate in the following subsections, these manifestly are not appropriate legal standards of proof. They depart radically from the settled teachings of the Court. They have no justification in policy or legal principle, and they trivialize the importance of Professor Baldus's real and powerful racial findings.

A. The Court of Appeals Ignored This Court's Decisions Delineating A Party's Prima Facie Burden Of Proof Under The Equal Protection Clause

#### (i) The Controlling Precedents

In Batson v. Kentucky, the Court recently outlined the appropriate order of proof under the Equal Protection Clause. "[I]n any equal protection case, 'the burden is, of course,' on the defendant. . . 'to prove the existence of purposeful discrimination.' Whitus v. Georgia, 385 U.S. [545], at 550 [1967] ..." 90 L.Ed. 2d at 85. "[The defendant] may make out a prima facie case of purposeful discrimination by showing that the totality of relevant facts gives rise to an inference of discriminatory purpose." Washington v. Davis, [426 U.S.] at 239-242:"

Once the defendant makes the requisite showing, the burden shifts to the State to explain

adequately the racial exclusion. Alexander v. Louisiana, 405 U.S. [625], at 632 [(1972)]. State cannot meet this burden on mere general assertions that its officials did not discriminate or that they properly performed their duties. See Alexander v. Louisiana, supra, at 632; Jones 389 U.S. 24, v. Georgia, Rather the State must (1967). that "permissible demonstrate racially selection neutral criteria and procedures have produced the . . . result."

90 L.Ed.2d 85-86.

The approach is "a traditional feature of the common law," Texas Dep't of Community Affairs v. Burdine, 450 U.S. at 255 n.8, which, in the context of discrimination litigation, requires a complainant to "eliminate[] the most common nondiscriminatory reasons for the [observed facts]," id. at 254, and then places a burden on the alleged wrongdoer to show "a legitimate reason for" those facts, id. at 255, thereby "progressively... sharpen[ing] the inquiry into the elusive factual

question of intentional discrimination."

Id. at 255 n.8.15

Although the initial showing of race-based state action required depends upon the nature of the claim and the responsibilities of the state actors involved, Washington v. Davis, 426 U.S. at 253 (Stevens, J., concurring), Castaneda v. Partida, 430 U.S. 482, 494-95 (1977); cf. Wayte v. United States, \_\_U.S.\_\_, 84 L.Ed.2d 547, 556 n.10 (1985), the guiding principle is that courts must make "a sensitive inquiry into such circumstantial and direct

<sup>15</sup>The roots of this approach run back at least as far as Neal v. Delaware, 103 U.S. 370 (1881), where the Court refused to indulge a "violent presumption," offered by the State of Delaware to excuse the absence of black jurors, that "the black race in Delaware were utterly disqualified, by want of intelligence, experience or moral integrity to sit on juries." 103 U.S. at 397. Absent proof to support its contention, the State's unsupported assertion was held insufficient to rebut the prisoner's prima facie case. Id.

Village of Arlington Heights v.

Metropolitan Housing Development Corp.,

429 U.S. 252, 266 (1977). Accord,

Rogers v. Lodge, 458 U.S. 613, 618

(1982). Among the most important
factors identified by the Court as

probative have been (i) the racial
impact of the challenged action, (ii)
the existence of a system affording
substantial state discretion, and (iii)
a history of prior discrimination.

# (ii) Petitioner's Evidence

The <u>prima facie</u> case presented by petitioner exceeds every standard ever announced by this Court for proof of discrimination under the Equal Protection Clause. The centerpiece of the case, although not its only feature, is the work of Professor Baldus and his colleagues, who have examined in remarkable detail the workings of

Georgia's capital statutes during the first seven years of their administration, from 1973 through 1979. The Baldus studies are part of a body of scientific research conducted both before and after Furman that has consistently reported racial discrimination at work in Georgia's capital sentencing system. 16 Baldus's research reached the same conclusions as the earlier studies, but there the resemblance ends: his work is vastly more detailed and comprehensive than any

<sup>16</sup> See, Wolfgang & Riedel, Race, Judicial Discretion and the Death Penalty, 407 Annals 119 (1973); Wolfgang & Riedel, Race, Rape and the Death Penalty in Georgia, 45 Am. Orthopsychiat. 658 (1975); Bowers & Pierce, Arbitrariness and Discrimination Under Post-Furman Capital Statutes, 26 Crime & Deling. 563 (1980); Gross & Mauro, <u>Patterns</u> of <u>Death</u>: <u>An Analysis</u> of <u>Racial Disparities</u> in <u>Capital</u> Sentencing and Homicide Victimization, 37 Stan. L. Rev. 27 (1984); Barnett, Some Distribution Patterns for the Georgia Death Sentence, 18 U.C. Davis L. Rev. 1327 (1985).

prior sentencing study in Georgia or elsewhere.

The Baldus research actually comprised two overlapping studies: the first, a more limited examination of cases from 1973-1978 in which a murder conviction had been obtained at trial (Fed.Tr.170); the second, a wide-ranging study involving a sample of all cases from 1973 through 1979 in which defendants indicted for murder or voluntary manslaughter had been convicted and sentenced to prison. (Id. 263-65). Most of Baldus' findings in this case are reported from the second study.

# a. The Racial Disparities

"The impact of the official action

-- whether it 'bears more heavily on one
race than another' . . . -- provide[s]
an important starting point." Arlington

Heights, 429 U.S. at 266. Here, the

Baldus studies reveal substantial, unadjusted racial disparities: a deathsentering rate nearly eleven times higher in white-victim cases than in black-victim cases. (Fed.Tr.730-33; S.E. 46). Professor Baldus testified that these figures standing alone did not form the basis for his analysis, because they offered no control for potential legitimate explanations of the observed racial differences. (Fed. Tr. 734). Professor Baldus thus began collecting data on every non-racial factor suggested as relevant by the literature, the case law, or actors in the criminal justice system. His final questionnaires sought information on over 500 items related to each case studied. (Fed.Tr.278-92; S.E. 1-42).

After collecting this vast storehouse of data, Professor Baldus and his colleagues conducted an exhaustive

series of analyses, involving the of increasingly application sophisticated statistical tools to scores of sentencing models. The great virtue of the Baldus work was the richness of his data sources and the extraordinary thoroughness of his analysis. Throughout this research, Baldus and his colleagues forthrightly tested many alternative hypotheses and combinations of factors, in order to determine whether the initial observed racial disparities would diminish or disappear. (Fed.Tr.1082-83). Far from concealing their results from scrutiny, they exposed them to open and repeated inquiry by others, soliciting from the State and obtaining from the federal judge in this case an additional "sentencing model" which they then tested and reported. (Fed.Tr.810; 1426; 1475-76) (R. 731-52).

The results of these analyses were uniform. Race-of-victim disparities not only persisted in analysis after analysis -- at high levels of statistical significance -- but the race of the victim proved to be among the more influential determiners of capital sentencing in Georgia. Professors Baldus and Woodworth indicated that their most explanatory model of the Georgia system, which controlled for 39 legitimate factors, revealed that, on average, the murderers of white victims faced odds of a death sentence over 4.3 times greater than those similarly situated whose victims were black. (See DB 82). Moreover, black defendants like petitioner McCleskey whose victims were white were especially likely to receive death sentences.

The Opportunity for Discretion
 The strong racial disparities shown

by Professor Baldus arise in a system affording state actors extremely broad discretion, one unusually "susceptible of abuse." Castaneda v. Fartida, 430 U.S. at 494. The existence of discretion is relevant because of "the opportunity for discrimination [it] . . . present[s] the State, if so minded, to discriminate without ready detection." Whitus v. Georgia, 385 U.S. at 552. The combination of strong racial disparities and a system characterized by ample State discretion has historically prompted the closest judicial scrutiny. See, e.g., Yick Wo v. Hopkins, 118 U.S. at 373-74.

Post-<u>Furman</u> capital sentencing systems in general are characterized by a broad "range of discretion entrusted to a jury," which affords "a unique opportunity for racial prejudice to operate but remain undetected." <u>Turner</u>

v. Murray, 90 L.Ed. 2d at 35. The Georgia system is particularly susceptible to such influences, since Georgia: (i) has only one degree of murder, Gregg v. Georgia, 428 U.S. 153, 196 (1976); (ii) permits a prosecutor to accept a plea to a lesser offense, or to decline to submit a convicted murder case to a sentencing jury, even if statutory aggravating circumstances exist, id. at 199; (iii) includes several statutory aggravating circumstances that are potentially vague and overbroad, id. at 200-02 (at least one of which has in fact been applied overbroadly, Godfrey v. Georgia, 446 U.S. 420 (1980)); and (iv) allows a Georgia jury "an absolute discretion" in imposing sentence, unchecked by any facts or legal principles, once a single aggravating circumstance has been found. Zant v. Stephens, 462 U.S. 862, 871

13

(1983).

Petitioner presented specific evidence which strongly corroborated this general picture. The District Attorney for Fulton County, where petitioner was tried, acknowledged that capital cases in his jurisdiction were handled by a dozen or more assistants. (Dep. 15, 45-48). The office had no written or oral policies or guidelines to determine whether a capital case would be plea-bargained or brought to trial, or whether a case would move to a sentencing proceeding upon conviction. (Dep. 12-14, 20-22, 28, 34-38). The District Attorney admitted that his office did not always seek a sentencing trial even when substantial evidence of aggravating circumstances existed. (Dep. 38-39). Indeed, he acknowledged that the process in his office for deciding whether to seek a death sentence was

"probably . . . the same" as it had been in the pre-Furman period. (Dep. 59-61). These highly informal procedures are typical in other Georgia jurisdictions as well. See Bentele, The Death Penalty in Georgia: Still Arbitrary, 61 Wash. U. L.Q. 573, 609-21 (1985) (examining charging and sentencing practices among Georgia prosecutors in the post-Furman period). 17

c. The History of Discrimination

Finally, "the historical background" of the State action under challenge "is

<sup>17</sup> This evidence is sufficient to overcome the constitutional presumption "that prosecutors will be motivated in their charging decisions [only by] . . . the strength of their case and the likelihood that a jury would impose the death penalty if it convicts." Gregg v. Georgia, 428 U.S. at 225. Professor Baldus performed a number of analyses on prosecutorial charging decisions, both statewide (Fed. Tr. 897-910; S.E. 56-57), and in Fulton County (Fed.Tr.978-81; S.E. 59-60), which demonstrate racial prosecutorial pleadisparities in bargaining practices.

Meights, 429 U.S. at 267. See generally Hunter v. Underwood, \_U.S.\_\_, 85 L.Ed.2d 222 (1985); Rogers v. Lodge, 458 U.S. 613 (1982). Petitioner supplemented his strong statistical case with references to the abundant history of racial discrimination that has plagued Georgia's past. Some of that history has been set forth in the petition for certiorari, and it will not be reviewed in detail in this brief.

It suffices to note here that, for over a century, Georgia possessed a formal, dual system of crimes and penalties, which explicitly varied by the race of the defendant and that of the victim. (See Pet. for Certiorari, 3-4). When de jure discrimination in Georgia's criminal law ended after the Civil War, it was quickly replaced by a social system involving strict de jure

segregation of most areas of public life, with consequent rampant de facto discrimination against blacks in the criminal justice system. 18 (Id., 8-11). This Court and the lower federal courts have been compelled repeatedly to intervene in that system well into this century to enforce the basic constitutional rights of black citizens. (See cases cited in Pet. for Certiorari, 10n.18. Unfortunately, the State's persistent racial bias has extended to the administration of its capital statutes as well.

In sum, petitioner presented the District Court with evidence of

<sup>18</sup> As a Georgia court held in 1907: "[E]quality [between black and white citizens] does not, in fact, exist, and never can. The God of nature made it otherwise and no human law can produce it and no tribunal enforce it." Wolfe v. Georgia Ry. & Elec. Co., 2 Ga. App. 499, 58 S.E. 899, 903 (1907).

substantial racial discrimination in Georgia's capital sentencing system, after controlling for hundreds of non-racial variables. He noted that this highly discretionary system was open to possible abuse, and he recited a long and tragic history of prior discrimination tainting the criminal justice system in general and the administration of capital punishment in particular. Nothing more should have been necessary to establish a prima facie case under this Court's settled precedents.

## (iii) The Opinion Below

A majority of the Court of Appeals found petitioner's evidentiary showing to be "insufficient to either require or support a decision for petitioner."

(J.A.246). The court in effect announced the abolition of the prima facie standard, and required instead

that petitioner produce evidence "so great that it compels a conclusion that the system is . . arbitrary and capricious," (J.A.258) and "so strong as to permit no inference other than that the results are the product of a racially discriminatory intent or purpose." (J.A.250). Petitioner failed this test, the court concluded, in part because his studies failed to take account of "'countless racially neutral variables,'" including

looks, age, personality, education, profession, job, clothes, demeanor and remorse, just to name a few. There are, in fact, no exact duplicates in capital crimes and capital defendants.

## (J.A.271-272).

To meet the lower court's standard of proof, in other words, would have required petitioner to anticipate and control for factors the court frankly acknowledged to be "countless." Such a

standard seems squarely, irretrievably at odds with the whole notion of a prima facie case. If a petitioner's evidence must "compel a conclusion" of discriminatory intent -- if it must anticipate and dispel every conceivable non-racial explanation -- then the socalled "prima facie" case is logically irrebuttable and required to be so. This insatiable demand for unspecified information is precisely what the Court condemned as error last Term in Bazemore v. Friday, 106 S.Ct. at 3009. (petitioner's' evidence need "not include 'all measurable variables thought to have an effect on [the matter at issue]"). It is no less error in this case.

B. The Court of Appeals Disregarded This Court's Teachings On The Proper Role Of Statistical Evidence In Proving Intentional Discrimination

Dr.

(i) The Controlling Precedents
Closely related to its repudiation

of the prima facie principle was the Court of Appeals' disparagement of statistical proof. Once again, the court's opinion clashed sharply with the pronouncements of this Court. "[0]ur cases make it unmistakably clear," Justice Stewart wrote in Teamsters v. United States, 431 U.S. 324, 339 (1977), "that '[s]tatistical analyses have served and will continue to serve an important role' in cases in which the existence of discrimination is a disputed issue." "Where gross statistical disparities can be shown, they alone may in a proper case constitute prima facie proof of a pattern or practice of discrimination." Hazelwood School District v. United States, 433 U.S. 299, 307-08 (1977). See, e.g. Castaneda v. Partida, 430 U.S. 482, 493-96 (1977). The statistical method chiefly relied upon by petitioner McCleskey -- multiple regression analysis -- was specifically discussed with approval by the Court in <u>Bazemore v. Friday</u>, 96 S.Ct. at 3009, and has received wide acceptance in the lower courts. 19

#### (ii) Petitioner's Evidence

In the District Court, Professors

Baldus and Woodworth explained in

painstaking detail every major

methodological issue they faced, how

they addressed the issue, and how it

of Houston, 654 F.2d 388, 402-03 (5th Cir. 1981), vacated and remanded on other grounds, 459 U.S. 809 (1982); EEOC v. Ball Corp., 661 F.2d 531 (6th Cir. 1981); Coble v. Hot Springs School District No. 6, 682 F.2d 721,731-32 (8th Cir. 1982); Eastland v. TVA, 704 F.2d 613 (11th Cir. 1983); Segar v. Smith, 738 F.2d at 1261, 1278-79; Vuyanich v. Republic Mat'l Bank, supra. See generally Finkelstein, The Judicial Reception of Multiple Regression Studies in Race and Sex Discrimination Cases, 80 Colum. L. Rev. 737 (1980); Fisher, Multiple Regression in Legal Proceedings, 80 Colum. L. Rev. 702 (1980).

affected their findings. See, e.g.,
Fed. Tr. 683; 704-05; 713; 783; 820;
917-18; 1222-24; 1279-82). In virtually
every instance of significance, they
conducted their analysis by alternative
methods, and demonstrated that the
choice of methods made no difference in
the racial disparities.

The Baldus studies drew accolades from Dr. Richard Berk, who evaluated their quality and soundness in light of his prior comprehensive review of sentencing research as a member of a National Academy of Sciences panel:

[Baldus' studies] ha[ve] very credibility, especially compared to the studies that [the National Academy of Sciences] . . reviewed. We reviewed hundreds of studies on sentencing . . . and there's no doubt that at this moment, this away the most far and complete and thorough analysis of sentencing that's ever been done. I mean there's nothing even close.

(Fed.Tr.1766).

Baldus and Woodworth conducted analyses with simple cross-tabular methods and with complex multivariate methods. (Tr. 122-28; S.E. 47-49). They used "weighted" and "unweighted" data. (Fed.Tr.621-26; S.E. 68-69). They used multiple regression models employing enormously large numbers of variables (230 or more) (Fed.Tr.802-04; S.E 51), and they used medium-sized and small models as well. (Fed.Tr.773-92; S.E. 58). Professor Baldus selected variables by employing his legal and professional expertise concerning the factors most likely to influence capital sentencing decisions. (Tr. 808-09). Then he permitted a computer to refine his selection by the use of "stepwise" regressions and other objective statistical means. (Fed.Tr.821-23).

Professors Baldus and Woodworth conducted analyses on the variables as

coded; then, when the State challenged those particular coding values, they recoded the variables and ran the analyses again. (Fed.Tr.1677-1700). They employed acceptable statistical conventions to "impute" values in the small number of cases where some data were actually missing (Fed.Tr.1101-02), but they also performed "worstcase" analyses in which they adopted assumptions most contrary to their theories and re-ran their analyses under such assumptions. (Fed.Tr.1101; 1701-07; S.E. 64-67).

Dr. George Woodworth, petitioner's statistical expert, testified to the appropriateness of the major statistical conventions used in the studies. (Fed.Tr.1265). He also testified about a series of "diagnostic" analyses he conducted to verify the statistical appropriateness of each procedure

selected.20 (Fed.Tr.1251-65).

Finally, indulging professional skepticism even as to the use of statistical methods, Professor Baldus conducted additional non-statistical, "qualitative" analyses in which he evaluated (a) all post-Furman Georgia cases with the "(b)(2)" "contemporaneous felony" aggravating circumstance (see DB 86); (b) all capital cases arising in Fulton County (Fed.Tr.842-45; see DB 109); and (c) all Fulton County cases involving police officer victims. (Fed. Tr. 1051-55: S.E. 61-63). He evaluated those cases through recognized scientific means, comparing the qualitative features and facts of each case to ascertain whether racial factors continued to play a

<sup>20</sup> Dr. Richard Berk confirmed during his testimony that the methods employed by Baldus and Woodworth were statistically appropriate. (Fed. Tr. 1766; 1784-86).

role. They did. (Fed.Tr.864-65; 993; 1055-56).

It is difficult to imagine a more wide-ranging and searching series of statistical and non-statistical analyses. The results were not only internally consistent; they were essentially consistent with all other research that has been conducted on Georgia's post-Furman capital system.

#### (111) The Opinion Below

The Court of Appeals treated statistical evidence as going to two distinct points, and ended by dismissing its utility for either purpose. The majority first held that statistical studies can never prove discrimination against an individual defendant. 21 This

<sup>21</sup> The Court of Appeals states this proposition in varying forms: "[G]eneralized statistical studies are of little use in deciding whether a particular defendant has been unconstitutionally sentenced to death." (J.A.260). "No single petitioner could,

thesis appears to rest in part upon the unobjectionable premise that statistics, dealing as they do with probabilities and averages, cannot purport to speak directly to the events in any particular case. Where it goes wrong is in denying that specific events can and often must be proved indirectly, by inferences drawn from probabilities. 22 It is unclear why the majority was unwilling to permit recourse to ordinary factfinding procedures for proof of of racially discrimination in capital sentencing. It may be unwarranted skepticism regarding the probative power

on the basis of these statistics alone, establish that he received the death sentence because, and only because, his victim was white." (J.A.267). "The statistics alone are insufficient to show that McCleskey's sentence was determined by the race of his victim, or even that the race of his victim contributed to the imposition of the penalty in his case." (J.A.270).

<sup>22</sup> Cf. Fed. Rule Evid. 406.

of statistics "[w]here intent and motivation must be proved." (J.A.250). Cf. Castaneda v. Partida, 430 U.S. at 495-97 & n.17 (finding statistical evidence sufficient to make out a prima facie case of intentional racial discrimination). Or it may reflect the improvident burden of proof announced by the Court of Appeals in capital cases, under which a condemned inmate must present evidence "so strong as to permit no inference other than that . . . of a racially discriminatory intent or purpose" (J.A.250 ). Either way, the result is incorrect and reversible. For the proper rule, of course, is that "as long as the court may fairly conclude, in the light of all the evidence, that it is more likely than not that impermissible discrimination exists, the . . is entitled to [claimant] . prevail." Bazemore v. Friday, 106 S.Ct.at 3009.

The Court of Appeals took a somewhat different tack regarding the bearing of statistical evidence on the second issue it perceived -- whether there was discrimination in "the system" as distinguished from discrimination aimed at "a particular defendant." (J.A.260). The majority tacitly conceded, as precedent requires, that statistical evidence might suffice in principle to compel an inference of system-wide discrimination. 23 (J.A.260-61). Yet the Court immediately faulted any

may for all practical purposes demonstrate unconstitutionality [where] . . . the discrimination is very difficult to explain on nonracial grounds." Washington v. Davis, 426 U.S. at 242. Accord: Batson v. Kentucky, 90 L.Ed.2d at 85. See also Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256, 275 (1979) ("[i]f the impact of this statute could not plausibly be explained on a neutral ground, impact itself would signal that the real classification made by the law was in fact not neutral.")

systemwide statistical study that did not take into account "every possible factor," e.g., each of the "'countless racially neutral variables'" that it hypothesized must exist. (J.A.261). It faulted even Professor Baldus's largest statistical models for this failure, and concluded that "[t]he type of research submitted here . . . is of restricted use in showing what undirected factors control" Georgia's capital sentencing system. (J.A.272).

A prima facie statistical case has never been supposed to require the anticipatory negation of "every possible factor" that might explain away an apparent pattern of discrimination.

Accounting for "the most common nondiscriminatory" factors is sufficient. Texas Dept't of Community Affairs v. Burdine, 450 U.S. at 254; see, e.g., Bazemore v. Friday, 106 S.Ct.

at 3009. Here, petitioner not only demonstrated substantial racial disparities; he then voluntarily assumed, and amply met, the burden of discounting every plausible non-racial explanation ever suggested. At that point, if not earlier, he met his prima facie burden.<sup>24</sup>

<sup>24</sup> Having done so, "'[i]f there [was] . . . a "vacuum" it [was] . . . one which the State [had to] . . fill, by moving in with sufficient evidence to dispel the prima facie case of discrimination.'" Turner v. Fouche, 396 U.S. at 361, quoting Avery v. Georgia, 345 U.S. 559, 562 (1953). See also Patton v. Mississippi, 332 U.S. 463, 468-69 (1947). To do so, the State was obligated to "make a 'clear and reasonably specific showing, based on admissible evidence, that [an] alleged nondiscriminatory explanation in fact explains the disparity." Segar v. Smith, 738 F.2d at 1268, quoting Texas Dep't of Community Affairs v. Burdine, 450 U.S. at 253-55. The State of Georgia never identified such a factor, much less made a "clear and reasonably specific showing" of its impact on Georgia's racial disparities.

C. The Court Of Appeals Erroneously Held That Even Proven Patterns Of Racial Discrimination Will Not Violate The Constitution Unless Racial Disparities Are Of Large Magnitude

The Court of Appeals committed two egregious errors -- one legal and the other factual -- in its treatment of petitioner's racial <u>results</u>. First, it held that the Equal Protection Clause prohibits discriminatory state conduct only if such conduct is of "substantial" magnitude. Secondly, it found petitioner's racial disparities to be "marginal."

yet the Fourteenth Amendment prohibits every instance of state-sanctioned discrimination, irrespective of its magnitude. And petitioner's racial findings are in fact quite substantial in magnitude: race ranks among the factors, whether legitimate or illegitimate, that exert the largest influence on Georgia's capital

sentencing system.

## (i) The Controlling Precedent

The Equal Protection Clause does not admit of partial performance. A State engaged in discrimination on the basis of race must cease its unconstitutional conduct altogether. This principle was confirmed last Term in Papasan v. Allain, supra. Responding to an argument that the Equal Protection Clause was not implicated in that case because school funds at issue there were "'an insignificant part of the total payments from all sources made to Mississippi's school districts,'" 106 S.Ct. at 2951-53, the Court expressly "decline[d] to append to the general requirements of an equal protection cause of action an additional threshold effects requirement." Id. at 2946 n.17.

The same principle emerges inferentially from <u>Bazemore</u> v. Friday,

which involved a dispute over a disparity of \$331 in the average yearly wages of black and white employees—less than 3% of the wage for white workers. The lesson of Bazemore is plain: if blacks prove that they regularly receive only 95 cents on the dollar from a State agency, the State cannot defend on the ground that a nickel is deminimus. 25

<sup>25</sup> The Court's jury discrimination cases are no exception to this rule. The Court's tolerance of minor differentials in racial representation between the jury-eligible populations and the representation on grand or petit jury lists reflects not constitutional indifference toward small acts of discrimination, but a recognition of the statistical properties of random small differences can selection: sometimes be attributed to chance. See Castaneda v. Partida, 430 U.S. at 496 n.17. "The idea behind the rule of exclusion is not at all complex. If a disparity is sufficiently large, then it is unlikely that it is due solely to chance or accident . . . " Id. at 494 n.13. In this case that problem is absent. Petitioner has amply proven that the racial disparities found here are statistically significant and were not chance findings.

### (ii) Petitioner's Evidence

The extraordinary array of alternative analyses conducted by Professor Baldus yielded, naturally enough, an extraordinary array of statistical and nonstatistical results- virtually all showing racial disparities. Professor Baldus testified that the most meaningful summary indicators of the magnitude of the racial factors found were the "death odds-multipliers" that he calculated using logistic regression analysis, a particularly appropriate statistical method for the data at issue in this case since the overall rate of death sentencing is quite low. (See Fed. Tr. 1230-34). The odds-multiplier for the race-of-victim factor under the best statistical model was 4.3, meaning that, on average, a Georgia defendant's odds of receiving a death sentence were 4.3

times greater if his victim was white than if the victim was black. As Professor Gross has observed:

It might be useful . . . to put these numbers in perspective. Coronary heart disease, it is well known, is associated with cigarette smoking. But what is the magnitude of the effect? . . .[C]ontrolling for age, smokers were 1.7 times more likely to die of coronary artery disease than nonsmokers. . . . [s] moking cigarettes increases the risk of from heart disease death greatly, but by a considerably smaller amount than the race-ofvictim effect that the Eleventh Circuit dismisses as marginal, 26

The Tables and Figures in the Supplemental Exhibits are exemplary of additional evidence presented in the District Court on the magnitude of the racial disparity. One of Professor Baldus' most important findings was that the impact of the racial factors varies

<sup>26</sup>Gross, Race and Death: The Judicial Evaluation of Evidence of Discrimination in Capital Sentencing, 18 U.C. Davis L. Rev. 1275, 1307 (1985).

with the seriousness of the cases:

Race is a factor in the system only where there is room for discretion, that is, where the decision maker has a viable choice. In a large number of cases, race has no effect. These are the cases where the facts are so mitigated the death penalty is not even considered as a possible punishment. At the other end of the spectrum are the tremendously aggravated murder cases where the defendant will very probably receive the death penalty, regardless of his race or the race of the victim. In between is the mid-range of cases where there approximately 20% is an racial disparity.

(J.A.315) (Clark, J., dissenting in part.) Professor Baldus prepared two tables, employing an "index method," that demonstrate this impact among more than 450 of the most aggravated Georgia cases. (Fed.Tr.880-83). In the tables, one of which appears in the Supplemental Exhibits at 54, the cases were arrayed into eight groups according to their level of seriousness, with the least aggravated cases in group 1 and the most

aggravated in group 8. The deathsentencing rates were then calculated
and reported for each group. In the
first two groups, no one was sentenced
to death and consequently no racial
disparities appear. Once death sentences
begin to be imposed, however, in groups
3 through 8, a gap quickly opens between
the death-sentencing rates in whitevictim cases and in black-victim cases,
with the white-victim cases showing a
consistently higher incidence of capital
sentences. 27 A similar pattern of

<sup>27</sup>Dr. Woodworth constructed a of figures to capture this number pattern visually. One of them, GW 8, appears in the Supplemental Exhibits at page 72. In GW 8, the horizontal axis right reflects toward the increasingly more aggravated groups of The vertical line represents the percentage increase in the likelihood of sentence. As GW 8 makes clear, a death become sufficiently once cases aggravated so that juries begin imposing the death-sentencing death sentences, rate rises more sharply among whitevictim cases than among black-victim cases. Thus, at any particular level of aggravation (until the two bands finally

disparities measured by race of the defendant among all white-victim cases, is reflected in DB 91 (Fed.Tr.885-86). Professor Baldus observed:

[W]hen you look at the cases in . . . the mid-range, where the facts do not call clearly for one choice or another, that's where you see there's room for the exercise of discretion . . . the facts liberate the decision maker to have a broader freedom for the exercise of discretion, and it is in the context of those decisions that you see the effects of . . . arbitrary or possibly impermissible factors.

(Fed.Tr.844). 28

Dr. Woodworth testified without contradiction that petitioner McCleskey's own crime fell into the

converge at the upper levels of aggravation), a significantly higher percentage of white-victim cases receive death sentences.

These findings support the "liberation hypothesis" advanced by Professors Harry Kalven and Hans Zeisel in their influential work, The American Jury 164-67 (1966). See generally Ballew v. Georgia, 435 U.S. 223, 237-38 (1978).

middle of the midrange of moderately aggravated cases. After reviewing the results of three separate statistical techniques, Dr. Woodworth concluded:

[A]t Mr. McCleskey's level of aggravation the average white victim case has approximately a twenty [20] percentage point higher risk of receiving the death sentence than a similarly situated black victim case.

(Fed.Tr.1740).

However, Professor Baldus also testified concerning the <u>average</u> impact of the racial factors across <u>all</u> of the cases. The Court of Appeals focused upon one regression coefficient<sup>29</sup>

petitioner's experts explained, measures the average effect of a particular factor on the outcome of a multiple regression analysis, after controlling for the cumulative impact of all of the other factors considered. For example, a coefficient of .06 for the race-of-victim factor in a multiple regression analysis measuring the death-sentence outcome means that, independently of every other factor considered, the race of the victim would increase the average likelihood of a death sentence by six percentage points. (Fed. Tr. 691-94).

reported in DB 83, which was derived from an analysis employing a 230-variable model. That coefficient, .06, indicates that when the race of the victim was white, the probability of a death sentence increased by 6-in-100.

Petitioner offered additional evidence, some of it statistical and some non-statistical, to identify more precisely the likely impact of Georgia's pervasive racial disparities on petitioner McCleskey's case. First, Baldus reported upon his analysis of data from Fulton County, where petitioner was tried. He testified that his performance of progressively more sophisticated analyses for Fulton

The number in parentheses in DB 83 under the .06 coefficient "(.02)" reflects the statistical significance of the coefficient. It indicates that the likelihood that this result would have occurred by chance if no racial disparities in fact existed is less than 2 per cent.

County, similar to those he had employed statewide, "show a clear pattern of race of victim disparities in death sentencing rates among the cases which our analyses suggested were death eligible." (Fed.Tr.983; 1043-44).

To supplement this statistical picture, Baldus examined a "cohort" of 17 Fulton County defendants arrested and charged, as was petitioner, with homicide of a police officer during the 1973-1979 period. Only two among the seventeen, Baldus found, even faced a penalty trial. One, whose police victim was black, received a life sentence. (Fed.Tr.1050-62; S.E. 61-63). Petitioner, whose police victim was white, received a death sentence. Although the small numbers require caution, "the principal conclusion that one is left with," Baldus testified, "is that . . . this death sentence that was imposed in McCleskey's case is not consistent with the disposition of cases involving police officer victims in this county." (Fed.Tr.1056).

Professor Baldus devised one additional measure of the magnitude of the influence of the racial factors. He first computed the regression coefficients for those factors and for other important aggravating mitigating factors. Then he rankordered them. As DB 81 demonstrates (S.E. 50), the race of the victim in Georgia exerts as much influence on the sentence outcome as whether the defendant had a prior murder conviction. It is more important in determining life or death than the fact that the defendant was the prime mover in the homicide, or that he admitted guilt and asserted no defense. This measurement reveals the power of race at work in the

Georgia death penalty system. Quite simply: its effects are of the same magnitude as those of statutory aggravating factors identified by the Georgia legislature as "prerequisite[s] to the imposition of the death penalty."

Gregg v. Georgia, 428 U.S. at 198.

## (iii) The Opinion Below

The Court of Appeals centered its attention on two statistics drawn from the Baldus studies: (i) the 6 percentage point average disparity in death-sentencing rates between all white-victim and all black-victim homicide cases; and (ii) the corresponding 20 percentage point disparity within the subgroup of moderately aggravated cases that included petitioner McCleskey's.

Toward the six percentage point figure, the court displayed equal measures of incomprehension, skepticism

and toleration. The court's incomprehension is reflected in its repeated characterization of the significance of the figure as "marginal" (J.A.273) or "insufficient." (J.A.268). This is a serious error. As one commentator has noted, although

[i]t sounds right when the court describes the '6% disparity' found by Baldus as a 'marginal difference [i]n fact it is nothing of the sort. Although the court seems to have missed the point entirely, this disparity actually means that defendants in white-victim cases are several times more likely to receive death sentences than defendants in black-victim cases.

Gross, supra, 18 U.C. Davis L. Rev. at 1298. What the court apparently did not appreciate is (a) that this figure represents an average race-of-victim disparity of 6 percentage points, not 6 percent, and (b) that the 6 percentage point average disparity occurs across an entire system in which overall death-

sentencing rates are only five per cent. (See Fed. Tr. 634; S.E. 45). Consequently, if the death-sentencing rate among a given group of black-victim cases were 6 percent, the rate for comparable white-victim cases would be 12 percent, a 100% increase. However, since the 6 percentage point disparity is an average effect, it is more relevant to compare it to the average .01 death sentence rate among all black victim cases (S.E. 47), which it exceeds by a factor of 6 (.06/.01), a 600% increase over the black-victim rate. It is obviously a gross mistake to view this difference as a "marginal" one. Cf. Hunter v. Underwood, \_U.S.\_\_, 85 L.Ed.2d 222, 228-30 (1985)(striking down a statute which disqualified blacks from voting at 1.7 times the rate of whites).

The court's admixture of skepticism is reflected in its remarks that "[n]one

of the figures mentioned above is a definitive quantification of the victim's race in the overall likelihood of the death penalty in a given case" (J.A.266), and that this evidence proves only that "the reasons for a [racial] difference . . . are not so clear in a small percentage of the cases." (J.A.273). In other words, the court regarded the .06 figure as little more than a statistical aberration. However, this interpretation cannot be squared with the unrebutted evidence that the figure in question -- which, it bears repeating, means that those who kill white victims in Georgia are several times more likely to be sentenced to death than are similarly situated murderers of black victims on the average -- is a highly reliable figure, statistically significant at the p<.02 level after controlling for literally

hundreds of rival hypotheses. It will not be blinked away.

The court's toleration of whatever disparity does exist comprises the greatest portion of its opinion:

Taking the 6% bottom line revealed in the Baldus figures as true, this figure is not sufficient to overcome the presumption that the statute is operating in a constitutional manner. In any discretionary system, some imprecision must be tolerated, and the Baldus study is simply insufficient support a ruling, in the context of a statute that is operating much as intended, that racial factors are playing a role in the outcome sufficient to render the system as a whole arbitrary and capricious.

(J.A.268).

The Court bolstered its judgment by citing three decisions of this Court on applications for stays in capital cases. 30 It reasoned that since the

<sup>30</sup> Wainwright v. Ford, 467 U.S. 1220 (1984); Wainwright v. Adams, 466 U.S. 964 (1984); Sullivan v. Wainwright, 464 U.S. 109 (1983).

petitioners in those cases had all proffered other studies in which "[t]he bottom line figure [included] . . . a 'death-odds multiplier' of about 4.8 to 1" (J.A.268), and since "Baldus obtained a death-odds multiplier of 4.3 to 1 in Georgia," a rejection of the Baldus studies "is supported, and possibly even compelled, by" the disposition of these stay applications. "[I]t is reasonable to suppose that the Supreme Court looked at the bottom line indication of racial effect and held that it simply was insufficient to state a claim." (J.A.269).

Yet as this Court well knows, the Florida study involved in those three applications was significantly less comprehensive and sophisticated than the Baldus studies. The Court of Appeals overlooks (i) that none of this Court's summary orders ever addressed the

magnitude of the disparities shown in the Florida studies; (ii) that this Court's orders respecting applications for stays of execution "may not be taken . . . as a statement . . . on the merits," Graves v. Barnes, 405 U.S. 1201, 1204 (1972)(Powell, J., in chambers); accord, Alabama v. Evans, 461 U.S. 230, 236 n.\* (1983)(Marshall, J., dissenting), and (iii) that under the constitutional principles outlined earlier, racial discrimination of any magnitude is unconstitutional.

When the Court of Appeals turned to the 20 percentage point statistic-representing the average racial disparity among cases similar in aggravation level to petitioner's -- the majority apparently became uncomfortable with any approach that treated such a figure as marginal. Instead, it felt compelled to dispense with its earlier

assumption (J.A.246) that the Baldus studies were valid. In a factual attack, the court complained that the figures were not adequately explained and that they were not shown to be statistically significant. (J.A.269-70). On both points the court ignored the record. Petitioner's experts carefully explained the basis of their calculations (Fed.Tr.1738-40), the importance of the numbers, the rationale of the "midrange" categories (id. 881-86; 1291-1300), and the statistical significance of each contributing figure. (Id. 1734-40; S.E. 50,54,68).

In sum, there is no constitutional warrant for the federal courts to overlook proven racial discrimination—especially in capital sentencing—merely because its impact is dubbed "marginal." Yet even if such a notion were permissible, petitioner has

adequately demonstrated that powerful, biasing forces are at work shaping Georgia's death-sentencing system in a racially discriminatory pattern, and that he is among those defendants most severely affected by the invidious forces.

- D. The Court Of Appeals Erred in Demanding Proof of "Specific Intent To Discriminate" As A Necessary Element Of An Eighth Amendment Claim
  - (i) The Controlling Precedents

The primary concern of the Court's Eighth Amendment cases has always been with the results of the sentencing process: capital punishment is cruel and unusual if "there is no meaningful basis for distinguishing the rew cases in which it is imposed from the many cases in which it is not."

Furman v. Georgia, 408 U.S. at 313 (1972) (White, J., concurring). Justice Stewart resolved Furman after "put[ting]. . . to one side" the issue

of intentional discrimination. Id. at 310. Justice Douglas similarly disavowed that the "task . . . to divine what motives impelled these death penalties." Id. at 253. No member of the Furman majority stated or hinted that proof of invidious intent had been necessary to his decision.

In its subsequent opinions, the Court has stressed that the ultimate aim of the Eighth Amendment is to "minimize the risk of wholly arbitrary and capricious action." Gregg v. Georgia, 428 U.S. at 189. Such arbitrariness can afflict a system irrespective of conscious choice by specific actors, and it is the State which bears the "constitutional responsibility to tailor and apply its law in a manner that avoids" this outcome. Godfrey v. Georgia, 446 U.S. at 428; Eddings v. Oklahoma, 455 U.S. 104, 118

(1982)(O'Connor, J., concurring);

Gardner v. Florida, 430 U.S. 349, 357-58
(1977). These rulings in capital cases
are consistent with the law of the
Eighth Amendment in other contexts,
where the constitutional touchstone has
long been effects, not intentions. See
Rhodes v. Chapman, 452 U.S. 337, 364
(1981)(Brennan, J., concurring). See
also id. at 345-46 (plurality opinion);
Spain v. Procunier, 600 F.2d 189, 197
(9th Cir. 1979); Rozecki v. Gaughan, 459
F.2d 6, 8 (1st Cir. 1972).

The evil identified in <u>Furman</u>, the evil which the Eighth Amendment seeks to prevent, is the unequal treatment of equals in the most extreme sentencing decision our society can make. <u>Gardner v. Florida</u>, 430 U.S. at 361. Considerations of race are legally irrelevant to that decision; their systematic influence produces, by

definition, a pattern of sentencing that is legally "arbitrary and capricious." See generally, B. Nakell & K. Hardy, The Arbitrariness of the Death Penalty (1986) (forthcoming). The task of identifying precisely where and how, consciously or unconsciously, race is influencing the literally thousands of actors involved in capital sentencing-prosecutors, judges, jurors who assemble to make a single decision in a single case, only to be replaced by other jurors in the next case, and still others after them -- is virtually impossible. Yet "[t]he inability to identify the actor or the agency has little to do with the constitutionality of the system." (J.A.314) (Hatchett, J., dissenting in part and concurring in part).

# (ii) Petitioner's Evidence Whatever disagreements may surround

the issue of intent, there is no room for dispute on the question of impact. Georgia's gross racial disparities are stark: white victim cases are nearly eleven times more likely to result in a death sentence than black victim cases. As we have shown, even under the most searching statistical analyses, this disproportionate racial impact remains substantial and highly statistically significant. The State has never refuted these results.

### (iii) The Opinion Below

The Court of Appeals held that "purposeful discrimination" is an element of an Eighth Amendment challenge to the arbitrary administration of a capital statute, at least where the challenge is based in part upon proof of racial disparities. (J.A.258). The court acknowledged that "cruel and unusual punishment cases do not normally focus

on the intent of the government actor."

Id. Yet it announced that

where racial discrimination is claimed, not on the basis of procedural faults or flaws in the structure of the law, but on the basis of the decisions made within that process, then purpose, intent and motive are a natural component of the proof that discrimination actually occurred.

(J.A.257).

This opinion is plainly an exercise in <u>ipse dixit</u> reasoning. If "discrimination" in this passage means "intentional discrimination of the sort that violates the Equal Protection Clause," then the court fails to account for what the Eighth Amendment adds to the Fourteenth. If "discrimination" is synonymous with "racial disparity" -- the actual basis of petitioner's Eighth Amendment claim-- then even the court's linguistic logic evaporates completely. In any event, the majority below fails to address

either the contrary holdings of this Court or the policies that lie behind the Eighth Amendment cases. It supplies no justification for singling out race bias -- alone among all arbitrary factors that might affect a capital sentencing system -- and requiring that petitioner trace it back to an individual, consciously discriminating actor. "Identified or unidentified, the result of the unconstitutional ingredient of race . . . is the same." (J.A.314) (Hatchett, J., dissenting in part and concurring in part). And it remains the same whether the racial ingredient comes into play through wilful bigotry or through more subtle processes of race-based empathies, apprehensions and value judgments operating within the framework of a highly discretionary capital sentencing procedure. See Turner v. Murray, 90

L.Ed.2d at 35-36. However brought about, the result is nonetheless "a pattern of arbitrary and capricious sentencing like that found unconstitutional in <a href="Furman." Gregg v.Georgia">Furman.</a>" Gregg v.Georgia, 428 U.S. at 195 n.46.

III.

THE COURT SHOULD EITHER GRANT PETITIONER RELIEF OR REMAND THE CASE TO THE COURT OF APPEALS FOR FURTHER CONSIDERATION UNDER APPROPRIATE LEGAL STANDARDS

In Skipper v. South Carolina,

\_U.S.\_\_, 99 L.Ed. 2d 1, 13 n.2 (1986),

Justice Powell observed in concurrence
that "when some defendants are able to
avoid execution based on irrelevant
criteria, there is a far graver risk of
injustice in executing others." The
criterion of race -- that of a defendant
or his victim -- is worse than
"irrelevant": it is expressly forbidden
by the Constitution. Yet petitioner's
evidence indicates (a) that race has
played a substantial role in determining

who will be executed and who will avoid execution in the State of Georgia, and (b) that petitioner stands among the group of defendants upon whom Georgia's burden of racial bias falls most heavily.

The Court of Appeals, accepting the validity of petitioner's evidentiary submission, held that it failed to meet his burden of proof under the Eighth and Fourteenth Amendments. We have shown that this holding was error, requiring reversal. Since the proof of racial discrimination on this record is overwhelming and stands unrebutted despite its plain sufficiency to shift the burden of rebuttal to the State, we believe that nothing more is needed to support a decision by this Court upholding the merits of petitioner's Eighth and Fourteenth Amendment claims. However, inasmuch as the Court of

Appeals pretermitted a review of the factual findings of the District Court (J.A.263), this Court may prefer instead to remand for further proceedings under appropriate constitutional standards.

See, e.g., Bazemore v. Friday, 106 S.Ct. at 3010-11.

While not strictly necessary to any holding that directs a remand, the Court might wish to announce standards to guide the Court of Appeals in addressing those remedial questions presented by petitioner's constitutional claims. In our judgment, the available remedial options would be affected considerably by the Courc's choice of constitutional theory. Although this choice is a matter of little immediate moment to the present petitioner, 31 the consequences

<sup>31</sup> The sole remedial issue in this habeas corpus proceeding is whether a petitioner "is in custody in violation of the Constitution or laws . . . of the

for other death-sentenced inmates in the State of Georgia might vary significantly depending upon it.

Under the Eighth Amendment, for example, proof that a particular capital sentencing system is being administered in an arbitrary or capricious pattern would presumably require the invalidation of that system as a whole, or at least of all sentences imposed in the jurisdiction during the period covered by the proof. See Furman v. Georgia, supra. Mowever, under the Fourteenth Amendment, the finding of an Equal Protection violation need not inevitably require a vacatur of all death sentences within the jurisdiction. In Mt. Healthy City Board of Educ. v. Doyle, 429 U.S. 274 (1977), the Court reasoned that although an employee could

United States," 28 U.S.C. § 2241(c)(3); thus the only relief sought or possible under any theory is individual relief.

not be discharged for the exercise of his protected First Amendment rights, an employer was entitled to "show[] by a preponderance of the evidence that it would have reached the same decision . . . even in the absence of consideration of the impermissible factor. Id. at 287. In the capital sentencing context, an analogous approach, requiring proof by the State beyond a reasonable doubt, see Chapman v. California, 386 U.S. 18 (1967), 32 would allow a State, even if

Mt. Healthy expressly drew upon principles, developed in the context of the criminal law, "distinguish[ing] a result caused by constitutional violation and one not so caused." 429 U.S. at 286, citing Lyons v. Oklahoma, 322 U.S. 596 (1944); Wong Sun v. United States, 371 U.S. (1963); Parker v. North Carolina, 397 U.S. 790 (1970). The Lyons line of cases is related to, though analytically distinct from, the Chapman "harmless error" line. The former holds that a constitutional violation may disregarded if it did not in fact work any injury to a petitioner's substantive rights. Chapman permits a state to avoid a reversal by demonstrating beyond a reasonable doubt that, even if an

its statute had been applied in violation of the Equal Protection Clause, to prove that, because of the extreme aggravation of a particular homicide, a death sentence would have been imposed, irrespective of racial considerations. Although Georgia could not make such a showing against inmates like petitioner, whose case was in the "midrange" of aggravation, it might have a stronger argument against those inmates whose crimes were highly aggravated, since race is less likely to have influenced the sentencing outcomes in their cases.

Whatever constitutional or remedial analysis is adopted by the Court, petitioner Warren McCleskey has presented evidence that fully

injury to defendant's rights occurred, it was so insubstantial that it did not contribute to the defendant's conviction or sentence.

establishes the merit of his claims. The sentence of death imposed upon him on October 12, 1978 by the Superior Court of Fulton County is invalid.

#### CONCLUSION

The judgment of the Court of Appeals should be reversed.

Dated: August 21, 1986

Respectfully submitted,

JULIUS L. CHAMBERS
JAMES M. NABRIT, III
\*JOHN CHARLES BOGER
DEVAL L. PATRICK
VIVIAN BERGER
99 Hudson Street
New York, New York 10013
(212) 219-1900

ROBERT H. STROUP 141 Walton Street Atlanta, Georgia 30303

TIMOTHY K. FOPD 600 Pioneer Building Seattle, Washington 98104

ANTHONY G. AMSTERDAM
New York University
School of Law
40 Washington Sq. South
New York, New York 10012

\*Attorney
of Record ATTORNEYS FOR PETITIONER

No. 84-6811

Supreme Court, U.S. FILED

SEP 22 1986

JOSEPH F. SPANIOL, JR.

## Supreme Court of the United States

October Term, 1985

WARREN MCCLESKEY.

Petitioner.

V.

RALPH KEMP, Superintendent, Georgia Diagnostic and Classification Center,

Respondent.

# ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

#### BRIEF FOR RESPONDENT

Mary Beth Westmoreland Assistant Attorney General Counsel of Record For Respondent

MICHAEL J. BOWERS Attorney General

Marion O. Gordon First Assistant Attorney General

WILLIAM B. HILL, JR. Senior Assistant Attorney General

Please serve:

Mary Beth Westmoreland 132 State Judicial Bldg. 40 Capitol Square, S.W. Atlanta, Georgia 30334 (404) 656-3349

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964 or call collect (402) 342-2831



### QUESTIONS PRESENTED

1.

Is the statistical analysis which was presented to the district court inadequate to prove a constitutional violation, both as a matter of fact and as a matter of law?

2.

Are the arbitrariness and capriciousness concerns of Furman v. Georgia, 408 U.S. 238 (1972), removed when a state properly follows a constitutional sentencing procedure?

3.

In order to establish a constitutional violation based on allegations of discrimination, must a petitioner prove intentional and purposeful discrimination?

## TABLE OF CONTENTS

		Page
QUE	ESTIONS PRESENTED	i
STA	TEMENT OF THE CASE	1
SUM	IMARY OF THE ARGUMENT	5
ARG	RUMENT	
I.	STATISTICAL ANALYSES ARE INADE QUATE AS A MATTER OF FACT AND LAW TO PROVE DISCRIMINATION UNDER THE FACTS OF THE INSTAN. CASE.	V C
II.	THE STATISTICAL ANALYSES IN THE IN STANT CASE ARE INSUFFICIENT TO PROVE RACIAL DISCRIMINATION.	0
Ш.	THE ARBITRARINESS AND CAPRICIOUS NESS CONCERNS OF FURMAN V. GEOR GIA, 408 U.S. 238 (1972), ARE REMOVED WHEN A STATE PROPERLY FOLLOWS A CONSTITUTIONAL SENTENCING PROCEDURE.	2- D A
IV.	PROOF OF DISCRIMINATORY INTENT IS REQUIRED TO ESTABLISH AN EQUAL PROTECTION VIOLATION.	
CON	CLUSION	37

### TABLE OF AUTHORITIES

Page(s)

0 0
CASES CITED:
Bazemore v. Friday, — U.S. —, 106 S.Ct. 3000 (1986)10, 20
Britton v. Rogers, 631 F.2d 572 (5th Cir. 1980), cert. denied, 451 U.S. 939 (1981)8
Caldwell v. Mississippi, 472 U.S. —, 105 S.Ct. 2633 (1985)
California v. Ramos, 463 U.S. 992 (1983)
Castaneda v. Partida, 430 U.S. 482 (1977)
Eastland v. Tennessee Valley Authority, 704 F.2d 613 (11th Cir. 1983)
Eddings v. Oklahoma, 455 U.S. 104 (1982)
Enmund v. Florida, 458 U.S. 782 (1982)
Equal Employment Opportunity Commission v. Datapoint Corporation, 570 F.2d 1264 (5th Cir. 1978)
Estelle v. Gamble, 429 U.S. 97 (1976) 24
Furman v. Georgia, 408 U.S. 238 (1972)
Godfrey v. Georgia, 446 U.S. 420 (1980)
Gomillion v. Lightfoot, 364 U.S. 339 (1960)33. 35
Gregg v. Georgia, 428 U.S. 153 (1976)25, 26, 27, 28, 29
Ingraham v. Wright, 430 U.S. 651 (1977)
International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977)
Johnson v. Uncle Ben's Inc., 628 F.2d 419 (5th Cir. 1980)
Lockett v. Ohio 429 II S 596 (1978) 13 96 97

## TABLE OF AUTHORITIES-Continued

Page(s
Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, rhng. denied, 330 U.S. 853 (1947)
Maxwell v. Bishop, 398 F.2d 138 (8th Cir. 1968), remanded on other grounds, 398 U.S. 262 (1970) 1
Mayor of Philadelphia v. Educational Equality League, 415 U.S. 605 (1974)
McCleskey v. Kemp, 753 F.2d 877 (11th Cir. 1985) (en banc)
McCleskey v. Zant, 580 F.Supp. 338 (N.D.Ga. 1984)
McCorquodale v. Balkcom, 525 F.Supp. 408 (N.D. Ga. 1981), affirmed, 721 F.2d 1493 (11th Cir. 1983) 1
McGautha v. California, 402 U.S. 183 (1971) 1
Oyler v. Boles, 368 U.S. 448 (1962)
Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256 (1979)
Proffitt v. Florida, 428 U.S. 242 (1976)
Pullman-Standard v. Swint, 456 U.S. 273 (1982) 1
Rogers v. Lodge, 458 U.S. 613 (1982)
Shaw v. Martin, 733 F.2d 304 (4th Cir. 1984)
Smith v. Balkcom, 660 F.2d 584 (5th Cir. 1981), on rehearing, 671 F.2d 858 (5th Cir. Unit B, 1982)
Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978)
Stephens v. Kemp, — U.S. —, 104 S.Ct. 562 (1983) 2
Trop v. Dulles, 356 U.S. 86 (1958)
Turner v. Murray, - U.S, 106 S.Ct. 1683 (1986)
United States v. Ironworkers Local 86, 443 F.2d 544 (9th Cir. 1971)

## TABLE OF AUTHORITIES—Continued

P	age(s)
United States v. United States Gypsum Co., 333 U.S. 364 (1948)	17
Valentino v. United States Postal Service, 674 F.2d 56 (D.C.Cir. 1982)	11
Village of Arlington Heights v. Metropolitan Hous- ing Development Corp., 429 U.S. 252 (1977)	32, 33
Wade v. Mississippi Cooperative Extension Service, 528 F.2d 508 (5th Cir. 1976)	10
Washington v. Davis, 426 U.S. 229 (1976)	
Wayte v. United States, — U.S. —, 105 S.Ct. 1524 (1985)	
Whitus v. Georgia, 385 U.S. 545 (1967)	
Wilkerson v. Utah, 99 U.S. 130 (1878)	
Wilkins v. University of Houston, 654 F.2d 388 (5th Cir. Unit A 1981)	11
Witherspoon v. Illinois, 391 U.S. 510 (1968)	
Woodson v. North Carolina, 428 U.S. 280 (1976)	
Yick Wo v. Hopkins, 118 U.S. 356 (1886)	
OTHER AUTHORITIES:	
Baldus & Cole, A Comparison of the Work of Thor- sten Sellin and Isaac Ehrlich on the Deterrent Effect of Capital Punishment, 85 Yale L. J. 170 (1975)	15
Fisher. Multiple Regression in Legal Proceedings, 80 Colum. L.Rev. 702 (1980)	
A. Goldberger, Topics in Regression Analysis (196	

## TABLE OF AUTHORITIES—Continued

Page	(s)
McCabe, The Interpretation of Regression Analysis Results in Sex and Race Discrimination Problems, 34 Amer. Stat. 212 (1980)	16
Smith and Abram, Quantitative Analysis and Proof of Employment Discrimination, 1981 U.III. L.Rev. 33 (1981)	15
G. Wesolowsky, Multiple Regression Analysis of Variance (1976)	15

# Supreme Court of the United States

October Term, 1985

WARREN MCCLESKEY,

Petitioner,

V

RALPH KEMP, Superintendent, Georgia Diagnostic and Classification Center,

Respondent.

# ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

### BRIEF FOR RESPONDENT

### STATEMENT OF THE CASE

In addition to the statement of the case set forth by the Petitioner, Respondent submits the following regarding the district court and circuit court proceedings:

Two different studies were conducted on the criminal justice system in Georgia by Professors Baldus and Woodworth, that is, the Procedural Reform Study and the Charging and Sentencing Study. See McCleskey v. Zant, 580 F.Supp. 338, 353 (N.D.Ga. 1984). The Petitioner presented his case primarily through the testimony of Professor David C. Baldus and Dr. George Woodworth. Petitioner also presented testimony from Edward Gates as

well as an official from the State Board of Pardons and Paroles. The state presented testimony from two expert statisticians, Dr. Joseph Katz and Dr. Roger Buford.

The district court made the following specific factual findings regarding the trustworthiness of the data base:

[T]he court is of the opinion that the data base has substantial flaws and that the petitioner has failed to establish by a preponderance of the evidence that it is essentially trustworthy. As demonstrated above, there are errors in coding the questionnaire for the case sub judice. This fact alone will invalidate several important premises of petitioner's experts. Further, there are large numbers of aggravating and mitigating circumstances data about which is unknown. Also, the researchers are without knowledge concerning the decision made by prosecutors to advance cases to a penalty trial in a significant number of instances. The court's purpose here is not to reiterate the deficiencies but to mention several of its concerns. It is a major premise of a statistical case that the data base numerically mirrors reality. If it does not in substantial degree mirror reality, any inferences empirically arrived at are untrustworthy.

McCleskey v. Zant, supra, 580 F.Supp. at 360 (emphasis in original). (J.A. 144-5).

The district court found as fact that "none of the models utilized by the petitioner's experts were sufficiently predictive to support an inference of discrimination." McCleskey v. Zant, supra at 361. (J.A. 149).

The district court also found problems in the data due to the presence of multicollinearity. The district court noted that a significant fact in the instant case is that white victim cases tend to be more aggravated, that is correlated with aggravating factors, while black victim cases tend to be more mitigated, that is correlated with mitigating factors. Every expert who testified, with the exception of Dr. Berk, agreed that there was substantial multicollinearity in the data. The district court found, "The presence of multi-colinearity substantially diminishes the weight to be accorded to the circumstantial statistical evidence of racial disparity." McCleskey v. Zant, supra at 364. (J.A. 153). The court then found Petitioner had failed to establish a prima facie case based either on race of victim or race of defendant. Id.

Additionally, the district court found "that any racial variable is not determinant of who is going to receive the death penalty, and, further, the court agrees that there is no support for a proposition that race has any effect in any single case." McCleskey v. Zant, supra at 366 (emphasis in original). (J.A. 157). "The best models which Baldus was able to devise which account to any significant degree for the major non-racial variables, including strength of the evidence, produce no statistically significant evidence that race plays a part in either of those decisions [by the prosecutor and jury] in the State of Georgia." McCleskey v. Zant, at 368 (emphasis in original). (J.A. 159).

Finally, the district court found that the analyses did not "compare identical cases, and the method is incapable of saying whether or not any factor had a role in the decision to impose the death penalty in any particular case." McCleskey v. Zant at 372 (emphasis in original). (J.A. 168). "To the extent that McCleskey contends that he was denied either due process or equal protection of the law, his methods fail to contribute anything of value to his

cause." McCleskey v. Zant at 372 (emphasis in original). (J.A. 169).

The court also found the Respondent presented direct rebuttal evidence to Baldus' theory that contradicted any prima facie case of system-wide discrimination, if one had been established. *McCleskey v. Zant* at 373.

In examining the issues, the Eleventh Circuit Court of Appeals assumed, but did not decide, that the research was valid because there was no need to reach the question of the validity of the research due to the court's legal analysis. The court specifically complimented the district court on its thorough analysis of the studies and the evidence. The Elevenih Circuit observed that the first study, the Procedural Reform Study, revealed no race of defendant effects whatsoever and revealed unclear race of victim effects. McCleskey v. Kemp, 753 F.2d 877, 887 (11th Cir. 1985) (en banc). As to the Charging and Sentencing Study, the court concluded, "There was no suggestion that a uniform institutional bias existed that adversely affected defendants in white victim cases in all circumstances, or a black defendant in all ases." Id. Finally, the court concluded the following in relation to the data specifically relating to the county in which the Petitioner was convicted, that is, Fulton County, Georgia:

Because there were only ten cases involving police officer victims in Fulton County, statistical analysis could not be utilized effectively. Baldus conceded that it was difficult to draw any inference concerning the overall race effect in these cases because there had been only one death sentence. He concluded that based on the data there was only a possibility that a racial factor existed in McCleskey's case.

Id. at 887 (emphasis in original).

Any further factual or procedural matters will be discussed as necessary in the subsequent portion of the brief.

#### SUMMARY OF THE ARGUMENT

Although the petition in the instant case lists five questions presented, the main focus of this case is simply one of whether there has been racial discrimination in the application of the death penalty in Georgia and, in particular, whether there was racial discrimination in the imposition of the death penalty upon the Petitioner. Another way of looking at this issue is whether the Petitioner was selectively prosecuted and sentenced to death based on his race and that of the victim or whether Petitioner's sentence is disproportionate. Regardless of the standard to be applied, an appropriate consideration is the intent of the decision-makers in question. A review of the cases of this Court dealing with death penalty statutes shows that the general arbitrariness and capriciousness which concerned the Court in 1972 is no longer a consideration if a state follows a properly drawn statute and if the jury's discretion is properly channeled. Thus, the focus in an Eighth Amendment analysis becomes a question of whether the sentence in a given case is "arbitrary" in the sense of being an aberration. The evidence in the instant case shows that the Georgia statutory scheme is functioning as it was intended to function and that those cases which are more severe are receiving stronger penalties while the less severe cases are receiving lesser penalties. There is no evidence to show that the Petitioner's sentence

in the instant case was arbitrary or capricious and no evidence to show that either the prosecutor or the jury based their decision on race.

In relation to an equal protection context, it has always been recognized that intentional and purposeful discrimination must be established for a constitutional violation to be proven. Although intent may be inferred from circumstantial evidence, the circumstantial evidence must be sufficient to establish a prima facie case of discrimination before intent will be inferred. Even if a prima facie case is shown, the Petitioner would still have the ultimate burden of proof after considering any rebuttal evidence.

In evaluating facts and circumstances of a given case, the court must consider the totality of the circumstances in determining whether the evidence is sufficient to find intentional and purposeful discrimination. Although statistics are a useful tool in many contexts, in the situation presented involving the application of the death penalty, there are simply too many unique factors relevant to each individual case to allow statistics to be an effective tool in proving intentional discrimination. Furthermore, the Petitioner's statistics in the instant case were found to be invalid by the district court, which was the only court making any factual findings in relation to those statistics. Thus, the clearly erroneous standard should apply to those factual findings. Furthermore, when a plausible explanation is offered, as it was in the instant case, that is, that white victim cases are simply more aggravated and less mitigated than black victim cases and that various factors tainted the statistics utilized, statistics alone or a disparity alone is clearly insufficient to justify an inference of discrimination. Furthermore, the statistics in question fail to take into consideration significant factors. Thus, the statistics in the instant case do not give rise to an inference of discrimination.

When reviewing all of the evidence in the instant case, it is clear that the findings of fact made by the district court are not clearly erroneous and that the statistical study in question should not be concluded to be valid so as to raise any inference of discrimination. The Petitioner failed to make a prima facie showing of discrimination and did not carry the ultimate burden of proof on the factual question of intent. Furthermore, Petitioner simply failed to show that his death sentence was arbitrary or capricious or was the result of racial discrimination either on the part of the prosecutor or on the part of the jury.

#### ARGUMENT

I. STATISTICAL ANALYSES ARE INADE-QUATE AS A MATTER OF FACT AND LAW TO PROVE DISCRIMINATION UNDER THE FACTS OF THE INSTANT CASE.

Respondent submits that the type of statistical analyses utilized in the instant case are not appropriate in a death penalty case when trying to evaluate the motivation behind a prosecutor's use of his discretion and the jury's subsequent exercise of discretion in determining whether

or not a death sentence should be imposed.¹ Each death penalty case is unique and even though statistics might be useful in jury composition cases or Title VII employment discrimination cases where there are a limited number of factors that are permissibly considered, in the instant case where the prosecutor has discretion to pursue a case through the criminal justice system and can consider any number of subjective factors and where a jury has complete discretion with regard to extending mercy, the subjective factors cannot be accounted for in a statistical analysis such as that utilized by the Petitioner in the instant case. Thus, Respondent would submit that this Court should completely reject the use of this type of statistical analysis as inappropriate in this case.

Even in the cases that have utilized statistical analysis in a context other than that present in the instant case, the courts have acknowledged various concerns with these analyses. This Court has recognized in another context, "Statistical analyses have served and will continue to serve an important role as one indirect indicator of racial discrimination in access to service on governmental bodies, particularly where, as in the case of jury service, the duty to serve falls equally on all citizens." Mayor of Philadelphia v. Educational Equality League, 415 U.S.

<sup>&</sup>lt;sup>1</sup>Respondent submits that a claim of discrimination based on race of victim is not cognizable under the circumstances of the instant case. At least one circuit court has specifically rejected statistical evidence based on the race of the victim, finding that the defendant lacked standing. *Britton v. Rogers*, 631 F.2d 572, 577 n.3 (5th Cir. 1980), cert. denied, 451 U.S. 939 (1981). Even those justices raising a question of possible racial discrimination in *Furman v. Georgia*, 408 U.S. 238 (1972), seemed to focus on race of the defendant and not race of the victim. Thus, Respondent submits that the instant claim is not cognizable due to the lack of standing.

605, 620 (1974) (emphasis added). In the instant case, however, there is no such uniform "duty" as in the jury composition cases, as all citizens are certainly not equally eligible for a death sentence, nor are even all perpetrators of homicides or murders equally eligible for a death sentence.

A central case regarding the use of statistics by this Court arises in International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977). Again, this was in the context of a Title VII action and not in a case such as the instant one involving so many subjective factors. The Court noted prior approval of the use of statistical proof "where it reached proportions comparable to those in this case to establish a prima facie case of racial discrimination in jury selection cases." Id. at 339. The Court also noted that statistics were equally competent to prove employment discrimination, which once again is different from the type of discrimination sought to be proved in the instant case. The Court specifically concluded, "We caution only that statistics are not irrefutable; they come in infinite variety and like any other kind of evidence, they may be rebutted. In short their usefulness depends on all of the surrounding facts and circumstances." Id. at 340. Thus, it is imperative to examine all of the facts and circumstances to determine whether the statistics in a give: case are even useful for conducting the particular analysis. In Teamsters, supra, the Court also had 40 specific instances of discriminatory action to consider in addition to the statistics and noted that even "fine tuning of the statistics could not have obscured the glaring absence of minority line drivers." Id. at 342 n.23. Thus, the Court did not focus exclusively on the statistics.

Problems have also been noted revolving around the particular use of statistics in any given case, many of which occur in the studies presented to the district court in the case at bar. In Bazemore v. Friday, — U.S. —, 106 S.Ct. 3000 (1986), the Court examined regression analyses and concluded that "the omission of variables from a regression analysis may render the analysis less probative than it otherwise might be" while noting that this would not generally make the analysis inadmissible. Id. at 3009. The Court did go on to note that there could be some cases in which the regression was so incomplete as to be inadmissible as irrelevant.

Circuit courts have also utilized statistics but have continually urged caution in their utilization even in jury selection and Title VII cases. Also, the courts frequently had other data on which to rely in addition to the statistical analyses. See United States v. Ironworkers Local 86, 443 F.2d 544 (9th Cir. 1971); Wade v. Mississippi Cooperative Extension Service, 528 F.2d 508 (5th Cir. 1976). The circuit courts have also recognized that statistical evidence can be part of the rebuttal case itself. The Fifth Circuit Court of Appeals examined a Title VII case in which the statistics relied upon by the plaintiff actually formed the very basis of the defendant's rebuttal case, that is that there was a showing that the statistics were not reliable. Equal Employment Opportunity Commission v. Datapoint Corporation, 570 F.2d 1264 (5th Cir. 1978). In that case, the court noted "while statistics are an appropriate method of proving a prima facie case of racial discrimination, such statistics must be relevant, material and meaningful, and not segmented and particularized and fashioned to obtain a desired conclusion." Id. at 1269. See also Johnson v. Uncle Ben's Inc., 628 F.2d 419 (5th Cir. 1980).

Circuit courts have also noted that due to the "inherently slippery nature of statistics" they are also subject to misuse. See Wilkins v. University of Houston, 654 F.2d 388 (5th Cir. Unit A 1981). In particular, that court focused on the fact that even though multiple regression analysis was a sophisticated means of determining the effects of factors on a particular variable, such an analysis was subject to misuse and should be employed with great care. Id. at 402-3. Other courts have emphasized that even though every conceivable factor did not have to be considered in a statistical analysis, the minimum objective qualifications had to be included in the analysis (in an employment context). "[W]hen the statistical evidence does not adequately account for 'the diverse and specialized qualifications necessary for [the positions in question],' strong evidence of individual instances of discrimination becomes vital . . . . " Valentino v. United States Postal Service, 674 F.2d 56, 69 (D.C.Cir. 1982).

The Eleventh Circuit Court of Appeals has examined statistical analyses and noted that the probative value of multiple regressions depends upon the inclusion of all major variables likely to have a large effect on the dependant variable and also depends on the validity of the assumptions that the remaining effects were not correlated with independent variables included in the analysis. The court also specifically questioned the validity of stepwise regressions, such as those used in the instant proceedings. Eastland v. Tennessee Valley Authority, 704 F.2d 613, 621 n.11 (11th Cir. 1983). The court emphasized

that a study had to begin with a decent theoretical idea of what variables were likely to be important.

Thus, examining a statistical analysis depends in part on the question of whether the analysis incorporated the requisite variables and whether there is an appropriate theoretical base for the incorporation of the variables. As found by the district court in the instant case, none of the models utilized by Professor Baldus necessarily reflected the way the system acted and specifically did not include important factors, such as credibility of the witnesses, the likelihood of a jury verdict, and subjective factors which could be appropriately considered by a prosecutor and by a jury. Thus, the district court properly rejected the statistical analyses in question.

More difficult problems arise with the attempted use of statistics in death penalty cases. In 1968 problems were found with the utilization of statistics, specifically presented by Marvin Wolfgang. The circuit court concluded that the study presented in that case was faulty for various reasons, including failing to take variables into account and failing to show that the jury acted with racial discrimination. The court also emphasized that it was concerned in that case with the defendant's sentencing outcome and only his case. The court concluded that the statistical argument did nothing to destroy the integrity of the trial. Maxwell v. Pishop, 398 F.2d 138 (8th Cir. 1968), remanded on other grounds, 398 U.S. 262 (1970).

An additional factor in the death penalty situation comes from the unique nature of the death sentence itself and the capital sentencing system. In *McGautha v. California*, 402 U.S. 183 (1971), the Court noted the diffi-

culty in identifying beforehand those characteristics which could be utilized by a sentencing authority in imposing the death penalty and the complex nature of those factors. Other circuit courts have rejected statistical analyses due to just such a reason. See Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978); Smith v. Balkcom, 660 F.2d 584 (5th Cir. 1981), on rehearing, 671 F.2d 858 (5th Cir. Unit B, 1982); McCorquodale v. Balkcom, 525 F.Supp. 408 (N.D.Ga. 1981), affirmed, 721 F.2d 1493 (11th Cir. 1983).

In cases upholding the constitutionality of various death penalty schemes, the Court has recognized that it is appropriate to allow a sentencer to consider every aspect regarding the defendant and the crime in question in exercising the discretion as to whether to extend mercy or impose the death penalty. Thus, in *Eddings v. Oklahoma*, 455 U.S. 104 (1982) the Court noted that the rule set down in *Lockett v. Ohio*, 438 U.S. 586 (1978) was a product of a "history reflecting the law's effort to develop a system of capital punishment at once consistent and principled but also humane and sensible to the uniqueness of the individual." *Eddings, supra* at 110.

Other factors that have been recognized by courts as being appropriate in a death penalty case and in the prosecutor's discretion are the willingness of a defendant to plead guilty, as well as the sufficiency of the evidence available. Shaw v. Martin, 733 F.2d 304 (4th Cir. 1984). As recently as 1986, this Court has acknowledged that in a capital sentencing proceeding the jury must make a "highly subjective, 'unique, individualized judgment regarding the penalty that a particular person deserves." Caldwell v. Mississippi, 472 U.S.—, 105 S.Ct. 2633, 2645-6

n.7 (1985); Turner v. Murray, — U.S. —, 106 S.Ct. 1683 (1986). In this context, "it is the jury that must make the difficult, individualized judgment as to whether the defendant deserves the sentence of death." Turner v. Murray, supra 106 S.Ct. at 1687. This focuses on what has long been recognized as one of the most important functions that a jury can perform, that is, "to maintain a link between contemporary community values and the penal system—a link without which the determination of punishment could hardly reflect 'the evolving standards of decency that mark the progress of a maturing society." Witherspoon v. Illinois, 391 U.S. 510, 519 n.15 (1968), quoting, Trop v. Dulles, 356 U.S. 86, 101 (1958).

Thus, the myriad of factors that are available for consideration by a prosecutor in exercising his discretion and by a jury in determining whether to extend mercy to a given defendant simply makes the utilization of these types of statistical analyses unworkable in a death penalty context. It is simply impossible to quantify subjective factors which are properly considered both by the prosecutor and by the jury in reaching these determinations. In fact, the evidence in the instant case fails to take into account these subjective factors, including the information known to the decision-maker, the likelihood a jury would return a verdict in a particular case, the possible credibility of individual witnesses, the availability of witnesses at the time of trial, the actual sufficiency of the evidence as determined by the prosecutor himself as well as numerous other factors.

In addition to all the above, commentators have also recognized that many of the factors present in the instant case cause problems with utilizing statistical analyses.

Professor Baldus himself has noted that "statistical sophistication is no cure for flaws in model construction and research design." Baldus & Cole, A Comparison of the Work of Thorsten Sellin and Isaac Ehrlich on the Deterrent Effect of Capital Punishment, 85 Yale L. J. 170, 173 (1975). In that same article, Professor Baldus acknowledged that the deterrent effect of capital punishment was just such a type of study that would be best suited by simpler methods of study than statistical analysis. Id. Other authors have questioned the validity of statistical methods which include inappropriate variables in the analysis as well as those which fail to include necessary variables. See Finkelstein. The Judicial Reception of Multiple Regression Studies in Race and Sex Discrimination Cases, 80 Colum. L.Rev. 737, 738 (1980). Other authors have also agreed with the testimony of the experts in this case regarding the problems presented by multicollinearity as well as the problems in utilizing stepwise regressions. See Fisher, Multiple Regression in Legal Proceedings, 80 Colum. L.Rev. 702 (1980); See also G. Wesolowsky, Multiple Regression Analysis of Variance (1976); A. Goldberger, Topics in Regression Analysis (1968).

Finally, certain authors have questioned the utilization of statistical analyses even in employment discrimination cases noting "it may be impossible to gather data on many of these differences in qualifications and preferences. Consequently, there will likely be alternative explanations, not captured by the statistical analysis, for observed disparities. . . . These alternative explanations must be taken into consideration in assessing the strength of the inference to be drawn from the statistical evidence." Smith

and Abram, Quantitative Analysis and Proof of Employment Discrimination, 1981 U.Ill. L.Rev. 33, 45 (1981).

Respondent submits that a consideration of the statistical analysis in the instant case reflects that it simply fails to comply with the appropriate conventions utilized for this type of analysis in that it fails to include appropriate variables, fails to utilize interaction variables, fails to specify a relevant model and has other fallacies, including multicollinearity which render the analysis nonprobative at best. As noted by a statistician in an article regarding race and sex discrimination and regression analysis:

It should be again emphasized that a statistical analysis provides only a limited part of the total picture that must be presented to prove or disprove discrimination. . . . "No statistician or other scientist should ever put himself/herself in a position of trying to prove or disprove discrimination."

McCabe, The Interpretation of Regression Analysis Results in Sex and Race Discrimination Problems, 34 Amer. Stat. 212, 215 (1980).

### II. THE STATISTICAL ANALYSES IN THE IN-STANT CASE ARE INSUFFICIENT TO PROVE RACIAL DISCRIMINATION.

As noted previously, courts and commentators have expressed reservations about the use of statistics in attempting to prove discrimination. Respondent submits that even if the Court concludes statistical analysis is appropriate in a death penalty context, the "statistics" presented to the district court are so flawed as to have no pro-

bative value and, thus, cannot satisfy the Petitioner's burden of proof.2

Petitioner claims that the studies in question are the product of carefully tailored questionaires resulting in the collection of over 500 items of information on each case. The Respondent has proven, and the district court found, that the data bases are substantially flawed, inaccurate and incomplete.

As noted previously, statistical analyses, particularly multiple regressions. require accurate and complete data to be valid. Neither was presented to the district court. Design flaws were shown in the questionnaires utilized to gather data. There were problems with the format of critical items on the questionnaires, such that there was an insufficient way to account for all factors in a given case. "An important limitation placed on the data base was the fact that the questionnaire could not capture every nuance of every case." McCleskey v. Zant, supra at 356. (J.A. 136).

Further, the sources of the information were noticeably incomplete. Even though the Petitioner insisted that

<sup>2</sup>It is clear that the findings by the district court in regard to the question of intent and the evaluation of the statistical analysis are subject to the clearly erroneous rule. In *United States v. United States Gypsum Co.*, 333 U.S. 364 (1948), the Court acknowledged that the clearly erroneous rule set forth in rule 52(a) of the Federal Rules of Civil Procedure applied to factual findings. "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Id.* at 395. This principle has been held to apply to factual findings regarding motivations of parties in Title VII actions and it has been specifically held that the question of intentional discrimination is a pure question of fact. *Pullman-Standard v. Swint*, 456 U.S. 273, 287-8 (1982).

he relied on State sources, obviously those sources were not designed to provide detailed information on each case. As found by the district court, "the information available to the coders from the Parole Board files was very summary in many respects." McCleskey v. Zant, supra at 356. (J.A. 137). These summaries were brief and the police reports from which the Parole Board summaries were prepared were usually only two or three pages long. (F.H.T. 1343; J.A. 137). As found by the district court:

Because of the incompleteness of the Parole Board studies, the Charging and Sentencing Study contains no information about what a prosecutor felt about the credibility of any witnesses. R 1117. It was occasionally difficult to determine whether or not a co-perpetrator testified in the case. One of the important strength of the evidence variables coded was whether or not the police report indicated clear guilt. As the police reports were missing in 75% of the cases, the coders treated the Parole Board summary as the police report. R 493-94. Then, the coders were able to obtain information based only upon their impressions of the information contained in the file. R 349.

McCleskey v. Zant, supra at 357. (J.A. 137).

Furthermore, questionaires were shown to be miscoded. It was also shown there were differences in judgment among the coders. (F.H.T. 387).

Respondent also established that there were numerous inconsistencies between the coding for the Procedural Reform Study and the Charging and Sentencing Study. (J.A. 77-80; S.E. 78; Respondent's Exhibit 20A). These occurred in some variables generally considered to be important in a sentencing determination.

A further problem with the data base is due to the large number of unknowns. Although Petitioner claims to have collected information on over 500 variables relating to each case, the evidence showed that in the Charging and Sentencing Study alone there are an average of at least 33 variables coded as unknown for each questionnaire. (J.A. 139). A review of Respondent's Exhibits Nos. 17A and 18A shows the extent to which unknowns pervade the so-called complete data base. For example, in the Charging and Sentencing Study there are 445 cases in which it was unknown if there was a plea bargain. (S.E. 73-74; J.A. 69-74). Further complicating the data is the fact that Baldus arbitrarily coded unknowns as if the information did not exist without any knowledge as to whether the information was known to the prosecutor or jury.

Even though attempts were made in the district court to discount the unknowns, Petitioner did not succeed. In fact the district court concluded the so-called "worst case" analysis failed to prove that the coding decisions on the unknowns had no effect on the results. (J.A. 142). The Respondent also introduced evidence that the correct statistical technique would be to discard the cases with unknowns in the variables being utilized in the analysis and not utilize the cases in the analysis.<sup>3</sup>

The district court also concluded that no models offered by the Petitioner were sufficiently predictive as to be probative. (J.A. 149). As noted previously, regressions must include relevant variables to be probative. See

<sup>&</sup>lt;sup>3</sup>This is precisely the reason no independent model or regression analysis was presented by the Respondent. The data base was simply too flawed and eliminating cases with unknowns reduced the sample size to the extent that a valid analysis was futile.

Bazemore v. Friday, supra. No model was used which accounted for several significant factors because the information was not in the data base, i.e., credibility of witnesses, likelihood of a jury verdict, strength of the evidence, etc.4 Many of the small-scale regressions simply include a given list of variables with no explanation given for their inclusion. Even the large-scale 230-variable regression has deficiencies. "It assumes that all of the information available to the data-gathers was available to each decision-maker in the system at the time that decisions were made." McCleskey v. Zant, supra at 361. (J.A. 146). This is simply an unrealistic view of the criminal justice system which fails to consider simple issues such as the admissibility of evidence. Further the adjusted r-squared, which measures what portion of the variance in the dependent variable is accounted for by the independent variables in the model, even in the 230-variable model, is only approximately .5. (J.A. 147). Petitioner also fails to show the coefficients of all variables in the regressions.

Major problems are also presented due to multicollinearity in the data. See Fisher, supra. (J.A. 105-111). Multicollinearity will distort the regression coefficients in an analysis. (J.A. 106). It was virtually admitted that there is a high correlation between the race of the victim variable and many other variables in the study. According to the testimony of Respondent's experts, this was not accounted for by any analysis of Baldus or Woodworth. Various experiments conducted by Dr. Katz confirmed the

<sup>&</sup>lt;sup>4</sup>Although the second study purports to include strength of the evidence variables, there are such a high number of unknowns that it cannot be considered to be effectively included in any analysis.

correlation between aggravating factors and white victim cases and mitigating factors with black victim cases. See F.H.T. 1472, et seq.; Respondent's Exhibits 49-52. The district court specifically found neither Woodworth or Baldus had sufficiently accounted for multicollinearity in any analysis.

Petitioner has asserted that there is an average twenty point racial disparity in death sentencing rates which he asserts should constitute a violation of the Eighth or Fourteenth Amendments. As noted previously, the statistical analyses themselves have not been found to be valid by any court making such a determination; thus, this analysis is questionable at best. Furthermore, focusing on the so-called "twenty percentage point" effect misconstrues the nature of the study presented. The twenty percentage point "disparity" occurred in the so called "mid-range" of cases. This analysis attempted to exclude the most aggravated cases from its consideration as well as the most mitigated cases. The analysis did not consider whether the cases were actually eligible for a death sentence under state law, but was a consideration of all cases in the study which have been indicted either for murder or voluntary manslaughter.

A primary problem shown with the utilization of this "mid-range" analysis is the fact that Petitioner failed to prove that he was comparing similar cases in this analysis. By virtue of the previously noted substantial variables which were not included in the analysis, it can hardly be determined that the cases were similar.

Further, this range of cases referred to by the Petitioner was constructed based on the index method utilized extensively by Professors Baldus and Woodworth.

Dr. Katz testified for the Respondent concerning this index method and noted that an index is utilized to attempt to rank different cases in an attempt to conclude that certain cases had either more or less of a particular attribute. (J.A. 87). The numbers utilized in the comparisons mentioned above were derived from these indices and the numbers would "purport to represent the degree for a level of aggravation and mitigation in each case for the purpose of ranking these cases according to those numbers." Id. Dr. Katz noted that Professor Baldus had utilized regression analysis to develop the indices and had used a predicted outcome to form the index for aggravation and mitigation. Through a demonstration conducted by Dr. Katz utilizing four sample regressions, it was shown that the index method could be shaped to give different rankings from the same cases depending on what variables might be included in a particular regression. Through the demonstration. Dr. Katz showed that by including different variables in the model, the actual values for the index would change. "[T]he purpose of this was to show that at any stage, what is happening with the regression in terms of the independent variables it has available to it, is that it is trying to weigh the variables or assign coefficients to the variables so that the predicted outcomes for the life sentence cases will have zero values and the predicted outcomes for the death sentence cases will have one value, regardless of the independent variables that it has to work with." (J.A. 98-9). The examination of this testimony as well as the exhibits in connection therewith shows that the index method itself is capable of misuse and abuse and, depending on the particular regression equation utilized, the index values can be different. No

adequate explanation was provided for the particular variables included in the regression analysis so as to justify utilizing the index values. Thus, it was simply not shown that the cases being compared to develop this "mid-range" were actually similar. See McCleskey v. Zant, supra at 375-6. (J.A. 175).

Additionally, the .06 figure referred to by the Petitioner does not represent a true disparity. The .06 so-called "disparity" does not reflect any particular comparison of subgroups of cases. Further the .06 figure is a weight which is subject to change when variables are added to or subtracted from the model. (J.A. 233).

Regardless of the standard applied or the propriety of utilizing statistics in the instant case, the above shows that the data base is substantially flawed so as to be inadequate for any statistical analysis. Any results of any such analysis are thus fatally flawed and prove nothing about the Georgia criminal justice system.

### III. THE ARBITRARINESS AND CAPRICIOUS-NESS CONCERNS OF FURMAN V. GEORGIA, 408 U.S. 238 (1972), ARE REMOVED WHEN A STATE PROPERLY FOLLOWS A CONSTITI-TIONAL SENTENCING PROCEDURE.

Throughout the history of Eighth Abendment jurisprudence this Court has recognized, "[d]ifficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted...." Wilkerson v. Utah, 99 U.S. 130, 135-6 (1878). Furthermore, "[t]he cruelty against which the Constitution protects a convicted man is cruelty inherent in the method of punishment, not the necessary suffering involved in any method employed to extinguish life humanely." Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 464, rhng. denied, 330 U.S. 853 (1947). Members of the Court have not agreed as to the extent of the applicability of the Eighth Amendment. In Trop v. Dulles, 356 U.S. 86 (1958), the Court determined that the question was whether the penalty under examination in that case subjected the individual to a fate "forbidden by the principle of civilized treatment guaranteed by the Eighth Amendment." Id. at 99. The Court also went on to note that the Eighth Amendment was not a static concept but that the amendment "must draw its meaning from evolving standards of decency that mark the progress of a maturing society." Id. at 101.

The Eighth Amendment embodies "broad and idealistic concepts of dignity, civilized standards, humanity and decency . . . ." Estelle v. Gamble, 429 U.S. 97 (1976). In Ingraham v. Wright, 430 U.S. 651 (1977), the Court acknowledged that the Eighth Amendment prohibition against cruel and unusual punishment circumscribed the criminal process in three ways: (1) it limits the particular kind of punishment that can be imposed on those convicted; (2) the amendment proscribes punishment that would be grossly disproportionate to the severity of the crime; (3) the provision imposes substantive limits on what can be made criminal and punished as such.

Not until Furman v. Georgia, 408 U.S. 238 (1972), was the Court squarely confronted with a claim that the death penalty itself violated the Eighth Amendment. The holding of the Court in that case was simply that the carrying out of the death penalty in the cases before the Court constituted cruel and unusual punishment. Id. at 239.

In Gregg v. Georgia, 428 U.S. 153 (1976), this Court specifically examined the Georgia death penalty scheme. In so doing, the Court examined the history of the Eighth Amendment and the opinion in Furman v. Georgia. The Court noted that the Eighth Amendment was to be interpreted in a flexible and dynamic manner and that the Eighth Amendment was not a static concept. The Court went on to note, however, that the Eighth Amendment "must be applied with an awareness of the limited role played by courts." Id. at 174. In upholding the Georgia statute, the Court acknowledged that Furman established that the death sentence could not be imposed by sentencing proceedings "that created a substantial risk that it would be inflicted in an arbitrary and capricious manner." Id. at 188. The Court compared the death sentences in Furman as being cruel and unusual in the same way as being struck by lightning would be cruel and unusual. The Court further noted that Furman mandated that where discretion was afforded to a sentencing body, that discretion had to be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action. Finally, the Court acknowledged that in each stage of the death sentencing process an actor could make a decision which would remove the defendant from consideration for the death penalty. "Nothing in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution. Furman held only that in order to minimize the risk that the death penalty would be imposed on a capriciously selected group of offenders, the decision to impose it had to be guided by standards so that the sentence authorized would focus on the particularized circumstances of the crime and defendant." Gregg, supra at 199. The Court further emphasized that "[t]he isolated decision of a jury to afford mercy does not render unconstitutional a death sentence imposed upon defendants who were sentenced under a system that does not create a substantial risk of arbitrariness or caprice.... The proportionality review substantially eliminates the possibility that a person will be sentenced to die by the action of an aberrant jury." *Id.* at 203. The Court finally found that a jury could no longer wantonly and freakishly impose a death sentence as it was always circumscribed by the legislative guidelines.

The same time as the Court decided Gregg v. Georgia, supra, it also decided Proffitt v. Florida, 428 U.S. 242 (1976). The Court again noted that the "requirements of Furman are satisfied when the sentencing authority's discretion is guided and channelled by requiring the examination of specific factors that argue in favor of or against the imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition." Id. at 258.

Subsequently, the Court actually criticized states for restricting the discretion of the juries, thus, outlawing statutes providing for mandatory death sentences upon conviction of a capital offense. See Woodson v. North Carolina, 428 U.S. 280 (1976). The Court has also prohibited death penalty procedures which restrict the consideration of mitigating circumstances, consistently emphasizing that there must be an individualized consideration of both the offense and the offender before a death sentence could be imposed. Thus, in Lockett v. Ohio, 438 U.S. 587 (1978), the plurality noted that the joint opinion in Gregg, Proffitt and other cases concluded that in order

to comply with Furman the "sentencing procedure should not create a substantial risk that the death penalty was inflicted in an arbitrary manner, only that the discretion be directed and limited so that the sentence was imposed in a more consistent and rational manner. . . ." Lockett, supra at 597.

This Court has considered death penalty cases in an Eighth Amendment context, but from a different perspective than the arbitrary and capricious infliction of a punishment as challenged in Furman. In Godfrey v. Georgia, 446 U.S. 420 (1980), the Court was concerned with a particular provision of Georgia law and the question of whether the Georgia Supreme Court had followed the statute that was designed to avoid the arbitrariness and capriciousness prohibited in Furman. This Court essentially concluded that the state courts had not followed their own guidelines. This Court concluded that the death sentence should appear to be and must be based on reason rather than caprice and emotion. As the Georgia courts had not followed the appropriate statutory procedures in narrowing discretion in that case, the Court concluded that the sentence was not permissible under the Eighth Amendment. The Court did not deviate from its prior holding in Greag, supra, that by following a properly tailored statute the concerns of Furman were met.

The Court considered the death penalty in an Eighth Amendment context in *Enmund v. Florida*, 458 U.S. 782 (1982). The Court, however, did not consider the "arbitrary and capricious" aspect but focused on the question of the disproportionality of the death penalty for Enmund's own conduct in that case. Thus, the Court essen-

tially concluded that the death penalty was disproportionate under the facts of that case.

In California v. Ramos, 463 U.S. 992, 999 (1983), the Court noted that "[i]n ensuring that the death penalty is not meted out arbitrarily or capriciously, the Court's principal concern has been more with the procedure by which the State imposes the death sentence than with substantive factors the State lays before the jury as a basis for imposing death. . . ." Thus, the Court again focused on the state procedure in question and noted that excessively vague sentencing standards could lead to the arbitrariness and capriciousness that were condemned in Furman.

Further, in particular reference to the study in the instant case, Justice Powell observed:

No one has suggested that the study focused on this case. A "particularized" showing would require—as I understand it—that there was intentional race discrimination in indicting, trying and convicting [the defendant], and presumably in the state appellate and state collateral review that several times followed the trial. . . . Surely, no contention can be made that the entire Georgia judicial system, at all levels, operates to discriminate in all cases. Arguments to this effect may have been directed to the type of statutes addressed in Furman. As our subsequent cases make clear, such arguments cannot be taken seriously under statutes approved in Gregg.

Stephens v. Kemp, — U.S. —, 104 S.Ct. 562 n.2 (1983) (Powell, J., dissenting from the granting of a stay of execution). Justice Powell went on to note "claims based merely on general statistics are likely to have little or no merit under statutes such as that in Georgia." Id.

Respondent submits that reviewing all of the Court's Eighth Amendment jurisprudence, particularly in the death penalty context reflects that in order to establish a claim of arbitrariness and capriciousness sufficient to violate the cruel and unusual punishment provision of the Eighth Amendment, it must be established that the state failed to properly follow a sentencing procedure which was sufficient to narrow the discretion of the decision-makers. As long as the state follows such a procedure, the arbitrariness and capriciousness which were the concern in Furman v. Georgia, supra, have been minimized sufficiently to preclude a constitutional violation, particularly under the Eighth Amendment. An Eighth Amendment violation would result in the "arbitrary and capricious" context, only if the statutory procedure either was insufficient itself or the appropriate procedures were not followed. Other death penalty cases under the Eighth Amendment deal with different aspects of the cruel and unusual punishment provision, such as disproportionality or excessive sentences in a given case. That is simply not the focus of the inquiry here. Under the circumstances of the instant case, the Petitioner has not even asserted that Georgia's procedures themselves are unconstitutional, nor has the Petitioner asserted that those procedures which were approved in Gregg v. Georgia, supra, were not followed in the instant case. Thus, there can be no serious contention that there is an Eighth Amendment violation under the circumstances of this case. This is particularly true in light of the testimony of Petitioner's own expert that the Georgia charging and sentencing system sorts cases on rational grounds. (F.H.T. 1277; J.A. 154).

Insofar as the Petitioner would attempt to assert some type of racial discrimination under the Eighth Amendment provisions, there should be a requirement of a focus on intent in order to make this sentence an "aberrant" sentence so as to classify it as arbitrary and capricious. A simple finding of disparate impact is insufficient to make a finding of arbitrariness and capriciousness such as was the concern in Furman, supra, particularly when a properly drawn statute has been utilized and properly followed. Only a showing of purposeful or intentional discrimination can be sufficient to find a constitutional violation under these circumstances.

No Eighth Amendment violation can be shown in the instant case as Petitioner's own witness testified that the system acted in a rational manner. As shown by the analyses conducted by Professor Baldus and Dr. Woodworth, the more aggravated cases were moved through the charging and sentencing system and the most aggravated cases generally received a death sentence. The more mitigated cases on the other hand dropped out at various stages in the system receiving lesser punishments. Thus, this system does function in a rational fashion. Furthermore, it has not been shown that the death sentence in the instant case was arbitrary or capricious in any fashion. The jury found beyond a reasonable doubt that there were two statutory aggravating circumstances present. evidence also shows that the victim was shot twice, including once in the head at fairly close range. The evidence tended to indicate that Petitioner hid and waited for the police officer and shot him as the officer walked by. This was an armed robbery by four individuals of a furniture

store in which several people were, in effect, held hostage while the robbers completed their enterprise. It was thoroughly planned and thought out prior to the robbery occurring. Furthermore, the Petitioner had prior convictions for robbery before being brought to this trial. One of Petitioner's co-perpetrators testified against him at trial and a statement of the Petitioner was introduced in which he detailed the crime and even boasted about it. (J.A. 113-115). Thus, under the factors in this case it is clear that Petitioner's sentence is not arbitrary or capricious and there is clearly no Eighth Amendment violation.

# IV. PROOF OF DISCRIMINATORY INTENT IS REQUIRED TO ESTABLISH AN EQUAL PROTECTION VIOLATION.

It is well recognized that "[a] statute otherwise neutral on its face, must not be applied so as to invidiously discriminate on the basis of race." Washington v. Davis, 426 U.S. 229, 241 (1976), citing Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886). This Court has consistently recognized, however, that in order to establish a claim of discrimination under the Equal Protection Clause, there must be proof that the challenged action was the product of discriminatory intent. See Washington v. Davis, supra.

In 1962, the Court examined what was essentially an allegation of selective prosecution and recognized, "the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation." Oyler v. Boles, 368 U.S. 448, 456 (1962). In cases finding an equal protection violation, it is consistently recognized that the burden is on the petitioner to prove purposeful discrimination under the facts of the case. See Whitus v. Georgia, 385

U.S. 545 (1967). The Court specifically has recognized that the standard applicable to Title VII cases does not apply to equal protection challenges. "We have never held that the constitutional standard for adjudicating claims of invidious racial discrimination is identical to standards applicable under Title VII. . . ." Washington v. Davis, supra, 426 U.S. at 239. The Court went on in that case to note that the critical purpose of the equal protection clause was the "prevention of official conduct discriminating on the basis of race." Id. The Court emphasized that the cases had not embraced the proposition that an official action would be held to be unconstitutional solely because it had a racially disproportionate impact without regard to whether the facts showed a racially discriminatory purpose. It was acknowledged that disproportionate impact might not be irrelevant and that an invidious purpose could be inferred from the totality of the relevant facts, including impact, but "[d]isproportionate impact . . . is not the sole touchtone of an invidious racial discrimination forbidden by the Constitution. Standing alone it does not trigger the rule [cit.] that racial classes are to be subjected to the strictest scrutiny. . . . " Id. at 242.

Again in Castaneda v. Partida, 430 U.S. 482, 493 (1977), the Court held that "an official act is not unconstitutional solely because it has a racially disproportionate impact." (emphasis in original). Further, "[p]roof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 265 (1977). In Washington v. Davis the Court held that the petitioner was not required to prove that the decision rests solely on racially discrim-

inatory purposes, but that the issue did demand a "sensitive inquiry into such circumstantial and direct evidence of intent as may be available." Id; Village of Arlington Heights, supra. "Absent a pattern as stark as that in Gomillion<sup>5</sup> or Yick Wo, impact alone is not determinative, (footnote omitted) and the court must look to other evidence." Id. at 266. "In many cases to recognize the limited probative value of disproportionate impact is merely to acknowledge the 'heterogeneity' of the Nation's population." Id. at 266 n.15.

The Court also acknowledged that the Fourteenth Amendment guarantees equal laws, not necessarily equal results. Whereas impact may be an important starting point, it is purposeful discrimination that offends the Constitution. Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256, 273-4 (1979). A discriminatory purpose "implies more than intent as volition or intent as awareness of the consequences. . . . It implies that the decision makers selected or reaffirmed a particular course of action at least in part because of not merely in spite of its adverse effects on the identified group." Id. at 279; see also Wayte v. United States, - U.S. -, 105 S.Ct. 1524, 1532 (1985). The Court reemphasized its position in Rogers v. Lodge, 458 U.S. 613 (1982), in which the Court recognized "the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose," and acknowledged that a showing of discriminatory intent was required in all types of equal protection cases which asserted racial discrimination.

<sup>&</sup>lt;sup>5</sup>Gomillion v. Lightfoot, 364 U.S. 339 (1960).

Thus, it is clear from all of the above that a discriminatory purpose, requiring more than simply an awareness of the consequences, must be established in order to make out a prima facie showing of discrimination under the Equal Protection Clause, regardless of the type of equal protection claim that is raised. The burden is on the individual alleging this discriminatory selection to prove the existence of the purposeful discrimination and this includes the initial burden of establishing a prima facie case as well as the ultimate burden of proof.

In relation to the question of an Equal Protection violation, Petitioner has also failed to show intentional or purposeful discrimination. The Petitioner presented evidence to the district court by way of the deposition of the district attorney of Fulton County, Lewis Slaton. Throughout his deposition, Mr. Slaton testified that the important facts utilized by his office in determining whether to proceed with a case either to indictment, to a jury trial or to a sentencing trial, would be the strength of the evidence and the likelihood of a jury verdict as well as other facts. Mr. Slaton observed that in a given case there could exist the possibility of suppression of evidence obtained pursuant to an alleged illegal search warrant which would also affect the prosecutor's decision. (Slaton Dep. at 18). In determining whether to plea bargain to a lesser offense, Mr. Slaton testified that his office would consider how strong the case was, how the witnesses would hold up under cross-examination, what scientific evidence was available, the reasons for the crime the mental condition of the parties, prior record of the defendant and the likelihood of what the jury might do. Id. at 30. As to proceeding to a

death penalty trial, Mr. Slaton testified that first of all the question was whether the case fell within the ambit of the statute and then he examined the atrociousness of the crime, the strength of the evidence and the possibility of what the jury might do as well as other factors. Id. at 31. He also specifically noted that his office did not seek the death penalty very often, for one reason because the juries in Fulton County were not disposed to impose the death penalty. Id. at 32. He also specifically testified he did not recall ever seeking a death penalty in a case simply because the community felt it should be done and did not recall any case in which race was a factor in determining whether to seek a death penalty. Id. at 78.

This is a case in which the Petitioner has in effect by statistics alone sought to prove intentional discrimination. Although Petitioner has alleged anecdotal evidence was submitted, in fact, little, if any, was presented to the district court outside the deposition of Lewis Slaton and one witness who gave the composition of Petitioner's trial jury. As noted previously, Respondent submits that statistics are not appropriate in this type of analysis and the Petitioner's statistics in this case are simply invalid; however, regardless of that fact any disparity noted is simply not of the nature of such a gross disparity as to compel an inference of discrimination, unlike earlier cases before the court. See e.g., Gomillion v. Lightfoot, 364 U.S. 339 (1960). Absent the "inexorable zero" or a gross disparity similar to that, this type of evidence under the unique circumstances of a death penalty situation should not be sufficient to find an inference of discrimination, particularly when both lower courts have found that no intentional discrimination was proven. Thus, Respondent submits that regardless of the standard utilized, Petitioner has failed to meet this burden of proof.

Regardless of the standard used for determining when a prima facie case has been established, it is clear where the ultimate burden of proof lies. Under the circumstances of the instant case, it is clear that the ultimate burden of proof rested with the Petitioner and he simply failed to meet his burden of proof either to establish a prima facie case of discriminatory purpose or to carry the ultimate burden of proof by a preponderance of the evidence.

## CONCLUSION

For all of the above and foregoing reasons, the convictions and sentences of the Petitioner should be affirmed and this Court should affirm the decision of the Eleventh Circuit Court of Appeals.

Respectfully submitted,

Mary Beth Westmoreland Assistant Attorney General Counsel of Record for Respondent

MICHAEL J. Bowers Attorney General

Marion O. Gordon First Assistant Attorney General

WILLIAM B. HILL, JR. Senior Assistant Attorney General

MARY BETH WESTMORELAND 132 State Judicial Building 40 Capitol Square, S. W. Atlanta, Georgia 30334 (404) 656-3349

,0

EILED

OCT 4 1986

DOEPH F. SPANIOL, JR

## IN THE

## Supreme Court of the United States

OCTOBER TERM, 1986

WARREN MCCLESKEY,

Petitioner,

V

RALPH M. KEMP, Superintendent, Georgia Diagnostic & Classification Center.

On Writ of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

## PETITIONER'S REPLY BRIEF

Julius L. Chambers
James M. Nabrit, III

\*John Charles Boger
Deval L. Patrick
Vivian Berger
99 Hudson Street
New York, New York 10013
(212) 219-1900

ROBERT H. STROUP 141 Walton Street Atlanta, Georgia 30303

TIMOTHY K. FORD 600 Pioneer Building Seattle, Washington 98104

ANTHONY G. AMSTERDAM
New York University School of Law
40 Washington Square South
New York, New York 10012

\*Attorney of Record

Attorneys for Petitioner

## TABLE OF CONTENTS

			Page
ARGUME	NT		
I.	Exception Protection The Cour Decline Invitati Capital Systems	No "Death Penalty on" To The Equal on Clause, And ot Should Firmly Respondent's on To Insulate Sentencing From Claims Of discrimination	3
II.	Deficient By Responsible The D Impeach ing Of R ination	The Purported cies Identified andent Or Found istrict Court The Basic Show-acial Discrim-Made By	14
		eliability of the Base	16
	(i)	Data Sources	16
	(11)	Questionnaire Design	19
	(iii)	Purported Coding Errors	23
	(iv)	Purported Mis- treatment of	26

В.	The Effect of Multi-	
	collinearity	30
c.	The "Direct Rebuttal	
	Evidence"	32
D.	The Suggestion of	
	Contrary Findings	35
CONCLUSIO	N	42

## TABLE OF AUTHORITIES

Cases	<u>le</u>
Batson v. Kentucky, U.S, 90 L.Ed.2d 69 (1986)	8
Bazemore v. Friday,U.S, 92 L.Ed.2d 315 (1986)10,16,3	3
Detroit Police Officers Ass'n v. Young, 608 F.2d 671 (6th Cir. 1979)	1
Gregg v. Georgia, 428 U.S. 153 (1976)	3
Keyes v. School District No. 1, 413 U.S. 189 (1973)	8
McGautha v. California, 402 U.S. 183 (1971)	5
Segar v. Smith, 738 F.2d 1249 (D.C. Cir. 1984)	1
State v. Andrews, 574 P.2d 709 (Utah 1971)	3
Trout v. Lehman, 702 F.2d 1094 (D.C. Cir. 1983)11,3	3
Village of Arlington Heights v.  Metropolitan Housing Development  Corp., 429 U.S. 252 (1977) 4,	7
Vuyanich v. Republic Nat'l Bank, 505 F. Supp. 224 (N.D. Texas 1980)	1

14	<b>as</b>	$u_1u$	gt	on	V		na	V	12		9	12	O		U.	. 3	٠.	4	2	9					
		(1	97	6).					٠.														٠		4
S	ta	tut	es																						
G	a.	Co	de	Ar	nn.		52	7	-2	5	37		(	S	uŗ	oţ	٠.		1	9	7	5	)		6
G	a.	Co	de Suj																						6
		,						,	•	•		•	•	•			•	•	•	٠	•	•	•		
0	the	er	Au	the	ori	it	ie	s	<u>:</u>																
F	isl	ner																							
		70																						9	31
																									31
G	ros	Ev:	Ra	ice	1 0	n	<u>d</u>	De	ea	th	1:	-	T	he	-	7	u	d	<u>i</u>	C	1	a	1_		
		Di	SCI	·in	iir	a	ti	01	1	ir	1	C	a	p.	it	a	1	_							
		Sei																							31
		Re	٧.	12	15	•	( 1	96	33	, .	• •	•	•		• •		•	•		•	•	•	*		31
K.	led	k,																							
		Hy	7 1	he	Se	S	id	Mo	nc	es e	f	0	<u>-</u>	-	3 U	LM	m i	a	r	1:	<u>z</u> ·	=			
		Dis	SCI	·im	in	a	ti	or	1	ir	1	S	eı	nt	: e	n	C	1	n	P					
		9 1																							
		(19	900	,,.	• •	•	• •	• •	•	• •		•		• •			•	*	•	•	•	•	•		41
No	ote																						-		
		(19	980	))	• •	•	• •		•					• •		•		*	٠	. :	38	3	, 39	9,	40
Ur	nit	ed	St	at	es	I	De	p'	t	c	of		Ju	15	t	i	C	e	,						
		Nat																							
		(A)															•	3		9					42

No. 84-6811

#### IN THE

## SUPREME COURT OF THE UNITED STATES October Term, 1986

WARREN MCCLESKEY,

Petitioner,

- v.-

RALPH M. KEMP, Superintendent, Georgia Diagnostic & Classification Center.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

#### PETITIONER'S REPLY BRIEF

The State of Georgia stakes its case largely on two propositions: <u>first</u> that capital cases are so unique that any statistical analysis of capital sentencing patterns is impossible as a

matter of law (Resp. Br. 7-16)1; and second, that certain methodological flaws in Professor Baldus's analysis of the Georgia data undermine his findings. (Resp. Br. 16-23; 31-36). We deal with these points in Parts I and II respectively. Neither impugns petitioner's strong evidence of racial discrimination, which continues to stand unmet and unrebutted by respondent, as it did during the 1983 federal hearing.<sup>2</sup>

<sup>&</sup>lt;sup>1</sup>Each reference to the brief for Respondent filed in the Court will be indicated by the abbreviation "Resp. Br.," followed by the number of the page on which the reference may be found. References to the Brief of Amici Curiae State of California, etc., et al., will be indicated by the abbreviation "Cal. Br." and to the Brief Amicus Curiae of the Washington Legal Foundation et al. by the abbreviation "WLF Br."

<sup>&</sup>lt;sup>2</sup>We emphasize that petitioner has presented his case on alternative Eighth and Fourteenth Amendment grounds. We do not discuss our Eighth Amendment claim in this brief, since respondent's Eighth Amendment arguments were anticipated and dealt with in our opening brief. (See Pet. 5r. 41-44; 97-104.)

THERE IS NO "DEATH PENALTY EXCEPTION"
TO THE EQUAL PROTECTION CLAUSE, AND
THE COURT SHOULD FIRMLY DECLINE
RESPONDENT'S INVITATION TO INSULATE
CAPITAL SENTENCING SYSTEMS FROM CLAIMS
OF RACIAL DISCRIMINATION

Respondent first contends that, in a capital case, "[s]tatistical analyses are inadequate as a matter of . law." (Resp. Br. 7). While this argument is couched in terms of "statistics," its actual purport is to exclude capital sentencing decisions entirely from the normal procedures and standards for proof of discrimination outlined in Batson v. Kentucky, \_\_U.S.\_\_, 90 L.Ed.2d 69 (1986) and its precursors. Those standards permit a defendant to "make out a prima facie case of purposeful discrimination by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose,"

Batson v. Kentucky, 90 L.Ed.2d at 86.

Under those standards, statistical evidence may sometimes "'for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on nonracial grounds.'" Batson v. Kentucky, 90 L.Ed.2d at 85, quoting Washington v. Davis, 426 U.S. 229, 242 (1976). See also Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 265-66 (1977).

Respondent offers three interrelated reasons why normal principles of Equal Protection jurisprudence should not apply in capital cases: (i) "[e]ach death penalty case is unique," (Resp. Br. 8), involving "too many unique factors relevant to each individual case," to permit any meaningful comparisons (id. at 6); (ii) the "myriad"

of factors" that influence capital sentencing decisions makes statistical analysis impossible (<u>id</u>. at 14); and (iii) many of the influential factors in capital cases are so subjective that they can neither be identified nor quantified (<u>id</u>.).

Respondent's first argument echoes the skepticism expressed in McGautha v. California, 402 U.S. 183, 204-07 (1971), that any objective standards can be found or formulated to regulate the choice of sentence in capital cases. Since every case is unique, respondent reasons, there can be no way to compare the dispositions in different cases, and thus there can be no proof that race has played an impermissible role. Yet McGautha's viewpoint has not stood the test of time: as this Court recognized in Gregg v. Georgia, 428 U.S. 153, 193-94 (1976), "the fact is that [capital

sentencing] standards have been developed . . [and that they] provide guidance to the sentencing authority."3

Respondent elsewhere argues that Georgia's capital system is constitutional precisely because its statutory sentencing standards guide jury discretion among more and less death-worthy cases (see Resp. Br. 23-31; see also, Cal. Br. 18-23; WLF Br. 5-7); he cannot simultaneously maintain that capital cases are so unique that it is impossible to identify meaningful

appellate review of death sentences to determine whether each is "disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." Ga. Code Ann. §27-2537. "If the [Georgia Supreme Court]... affirms a death sentence, it is required to include in its decision reference to similar cases that it has taken into consideration. §27-2537(e) (Supp. 1975)." Gregg v. Georgia, 428 U.S. at 167. All of this is, of course, fundamentally inconsistent with respondent's position that every capital case is so unique as to be incomparable with others.

sentencing standards when cases are actually compared.

Respondent's second argument transforms a quantitative distinction into a qualitative one. He suggests that since a capital sentencing decision involves many more considerations than an employment decision, evidentiary tools long held to be appropriate in employment discrimination cases simply have no place in capital cases. (Resp. Br. 8-10; see also Cal. Br. 23-28).

This argument is wrong in law and fact. Governmental decisions in which a large variety of legitimate variables must be considered are subject to proof of discrimination by the usual "sensitive inquiry into such circumstantial and direct evidence of intent as may be available." Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252,

266 (1977) (rezoning); Keyes v. School District No. 1, 413 U.S. 189 (1973) (school location and zoning). For example, in no area of the law-including capital sentencing -- has a wider or more subtle array of factors traditionally been deemed legitimate than in the exercise of peremptory challenges to prospective jurors. Yet in Batson the Court specifically held that traditional Equal Protection principles should guide lower courts in determining whether race has affected the prosecutor's decision to strike jurors peremptorily. Batson v. Kentucky, 90 L.Ed.2d at 87-88.

Furthermore, perhaps the greatest virtue of multiple regression analysis is precisely its ability to sort out and determine the influence of one factor, despite the presence of a large number of other factors which may also exert

independent influence. See, e.g., Fisher, Multiple Regression in Legal Proceedings, 80 Colum. L. Rev. 702, 704-06 (1980); Vuyanich v. Republic Nat'l Bank, 505 F. Supp. 224, 267-69 (N.D. Tex. 1980). Multiple regression techniques have regularly been relied upon determining medical, scientific, and agricultural issues many of which, like capital cases, involve scores of relevant considerations. As Professors Baldus and Woodworth testified below, for example, the statistical methods employed in petitioner's case were also central to the National Halothane Study, through which the national medical community made its life-or-death decision on the best anaesthetic for general medical use. (Fed. Tr. 155-58; 1200-02).

As his third justification for jettisoning normal Equal Protection

principles, respondent invokes an unnamed and apparently unknowable host of subjective factors that, he surmises, might affect capital decisionmaking. Respondent concludes that petitioner's failure -- indeed, the probable inability of any researcher -- to include all such factors in an empirical study necessarily renders proof of racial discrimination "impossible" in capital cases. (Resp. Br. 14).

Again, the argument is both legally and scientifically unsound. Bazemore v. Friday specifically held that "[w]hile the omission of variables from a regression analysis may render the analysis less probative than it might otherwise be, it can hardly be said, absent some other infirmity, that an analysis which accounts for the major factors 'must be considered unacceptable as evidence of discrimination.'" 92

L.Ed.2d 315, 331 (1986). Accord: Segar v. Smith, 738 F.2d 1249, 1287 (D.C. Cir. 1984); Trout v. Lehman, 702 F.2d 1094, 1101-02 (D.C. Cir. 1983); Detroit Police Officers Ass'n v. Young, 608 F.2d 671, 687 (6th Cir. 1979); Vuyanich v. Republic Nat'l Bank, 505 Supp. at 255-56.

This legal holding accurately reflects the scientific reality. Information on a missing variable does not make a significant difference unless the omitted variable (i) has an influence on death-sentencing which is not "captured by" other variables included in the analysis, and (ii) is itself systematically associated with race. (Fed. Tr.1690-94;1265-73). Thus, omission of a variable such as the "credibility of the witnesses" (Resp. Br. 12) would be important only if such "credibility" was not correlated with

detailed "strength-of-evidence" variables which Professor Baldus did include in his questionnaire (see S.E. 23-26, questions 61-62D; id. at 29-33),4 and if it were plausible to believe that jurors regularly (for non-racial reasons) find witnesses more credible in white-victim rather than black-victim The crucial point is that cases. unidentified factors which are not associated with race will occur randomly in white-victim cases and black-victim cases. They will not produce, and cannot explain away, a systematic pattern of differential capital sentencing between racial groups. Professor Baldus, who controlled for over 230 relevant variables, undoubtedly accounted for the "major sentencing determinants" in the Georgia system. Respondent's expert

<sup>\*</sup>Each reference to the Supplemental Exhibits will be indicated by the abbreviation "S.E."

admitted that he had no idea whether any additional variables might make a difference (Fed. Tr. 1569; 1591-92); and the eminent social scientists who have submitted a brief amici curiae in support of petitioner find it "extremely unlikely" that any such factor remains lurking in the shadows. (Brief Amici Curiae for Dr. Franklin M. Fisher, et al., at 22).

Respondent has, in sum, suggested no valid reason why constitutionally-based standards of proof that are applicable in all other areas of the law should be abandoned when a death-sentenced inmate seeks to prove that "in fact the death penalty [is] . . . being administered for any given class of crime in a discriminatory, standardless, or rare fashion," Gregg v. Georgia, 428 U.S. at

223 (White, J., concurring in the judgment).

#### II

NONE OF THE PURPORTED DEFICIENCIES
IDENTIFIED BY RESPONDENT OR FOUND BY
THE DISTRICT COURT IMPEACH THE BASIC
SHOWING OF RACIAL DISCRIMINATION
MADE BY PETITIONER

Respondent alternatively invokes findings of the District Court to contend factually: (i) that the "data base" upon which Professor Baldus and his colleagues drew for their information was so deficient -- and their questionnaire and data-collection methods so flawed -- that no valid statistical analyses can be based on their work (Resp. Br. 2; 17-19); (ii) that "multicollinearity" distorts Professor Baldus's research findings (Resp. Br. 2-3; 20-21); (iii) that the State's hypothesis that "white victim cases are simply more aggravated and less mitigated than black victim cases" (Resp.Br. 6) provides "direct rebuttal evidence to Baldus'theory" (Resp. Br. 4); and (iv) that contrary findings on the race-of-victim issue were reported by Professor Baldus himself (Resp. Br. 4), and, amici contend, by other sources as well. (See Cal. Br. 12 n.5; WLF Br. 18-19 & n.4.)

None of these arguments is correct; the record plainly refutes each one. It is hardly accidental that not a single judge of the Court of Appeals rested his or her opinion, even in the alternative, on the factual findings of the District Court. To the limited extent that those findings were not marred by legal error, 5 they were clearly erroneous.

<sup>&</sup>lt;sup>5</sup>The District Court's use of incorrect legal standards precludes reliance upon its findings of fact. For example, the District Court held that "[a]n important limitation

We will examine below a number of the more prominent findings relied upon by respondent. 6

- A. The Reliability of the Data Base
- (i) <u>Data Sources</u> -- Respondent contends that the sources of data available to Professor Baldus and his colleagues were "'very summary in many

placed on the data base was the fact that the questionnaire could not capture every nuance of every case," (J.A. 136), and that "[m]ultiple regression requires complete correct data to be utilized." (J.A. 144). The District Court also concluded, after an extensive, somewhat confused discussion, entitled "What a Multivariate Regression Can Prove," (J.A. 162), that "multivariate analysis is ill suited to provide the court with circumstantial evidence of the presence of discrimination, and it is incapable of providing the court with measures of in treatment qualitative difference which are necessary to a finding that a prima facie case has been established with statistical evidence." (J.A. 168-69)(italics omitted). All of these holdings are contrary to this Court's subsequent opinion in Bazemore v. Friday, 92 L.Ed.2d at 331.

<sup>6</sup>A more thorough examination of the District Court's findings appears in Appendix E to the Petition for Certiorari. McCleskey v. Kemp; No. 84-6811.

Board records, respondent claims, "were brief and the police reports from which the Parole Board summaries were prepared were usually only two or three pages long." Id. The Parole Board files, the District Court found, provided "'no information about what a prosecutor felt about the credibility of any witnesses.

R. 1117.'" (Resp. Br. 18).

This characterization of the data sources is incorrect almost from start to finish. Professor Baldus drew his information from an extraordinary range of official Georgia sources on each case, including the full trial transcripts, all appellate briefs, the files of the Georgia Department of Offender Rehabilitation, the files of the Georgia Bureau of Vital Statistics, and the files of the Parole Board. (See S.E. 43, DB 39). L.G. Ware testified

that the parole officials like himself who compile each of its files (all college graduates) prepare a special report: "We check local criminal records, we go to the clerk of [1331] court, get sentence information, indictments, jail time affidavits, we get police reports from the agency that handled the case." (J.A. 52). homicide cases "if we didn't think the report had all the information we thought we needed, we may interview the officers that were involved in the case . . . [or] the district attorney." (J.A. 54). A Parole Board Manual guides officials at every step:

[The report] should be obtained in narrative form. It should be taken from the indictment, the district attorney's office, the arresting officers, witnesses and the victim. A word picture telling what happened, when, why, where, how and to whom should be prepared. . . . Parole officers should be as thorough as possible when conducting post-sentences on persons who

have received life sentences or sentences in excess of fifteen years.

(J.A. 56-57). Although the District Court faulted the Parole Board files for lacking photostatic copies of the actual police reports in 75% of the cases (J.A. 137), Officer Ware testified without contradiction that nothing "contained in the police reports . . . would [be] routinely omit[ted]" from the Parole Board files. (J.A. 53). These files, in fact, were often superior to the written police reports since they contained the results of direct interviews with police officers and prosecutors about each case. (J.A. 54).

## Respondent also faults Professor Baldus's questionnaire design, alleging that there are "problems with the format of critical items on the questionnaires,

(ii) Questionnaire Design --

such that there was an insufficient way

to account for all factors in a given case." (Resp. Br. 17). Respondent quotes the District Court that "'[a]n important limitation placed on the data base was the fact that the questionnaire could not capture every nuance of every case.'" (See J.A. 136). Once again, these findings and contentions are themselves riddled with error. Professor Baldus developed three questionnaires, two for his first study, the Procedural Reform Study ("PRS") and one for the Charging and Sentencing Study. ("CSS"). Any restrictions on data entry under the "foil entry" method criticized by respondent were largely limited, as respondent's expert conceded (Fed. Tr. 1392), to the two PRS questionnaires. (Fed. Tr. 274). Professor Baldus testified that the "foil entry" format was virtually abandoned in the CSS questionnaire. (Fed. Tr. 1098-1101).

Since CSS data were used to conduct virtually all of the major analyses relied upon during the federal hearing, (Fed. Tr. 1437), respondent's criticism is essentially irrelevant.

The District Court's complaint that
the Baldus studies "could not capture
every nuance of every case" not only
reflects a legally erroneous standard of
proof but a straightforward
misunderstanding of the record.
Professor Baldus testified that because
no questionnaire could be devised to

Nevertheless, as a check on the impact of the use of the foil method, Baldus identified some 50 PRS cases in which there had been "overflow information that wouldn't fit into the original foils." He created new foils to handle the overflow information and reran each of the analyses. The race effects became "somewhat intensified when this additional information was included." (Fed. Tr. 1099-1100). Baldus also recoded and reran analyses involving the only two CSS items retaining the foil method of entry that contained overflow information. His CSS findings remained identical. (Fed. Tr. 1101).

anticipate every possible factor, he constructed a special "narrative summary" section precisely so that coders could "capture every nuance of each case." (Fed. Tr. 239; see S.E. 36).8

<sup>&</sup>lt;sup>8</sup>The brief of <u>amici</u> Washington Legal Foundation <u>et al</u>. displays a similar misunderstanding of Professor Baldus's powerful data collection instrument. Amici assert that one gruesome Utah murder they describe "would have been listed by the coders as a shooting." (WLF Br. at 24, citing the District Court, see J.A. 136-37). Amici are mistaken. Both the PRS and the CSS questionnaires contain numerous entries through which the special features of this case could have been coded. example, the CSS questionnaire provides: (i) three entry foils, plus an "other" blank space, to code the method of killing (see S.E. 14); (ii) an entry to reflect a contemporaneous rape (S.E. 7,Q. 29): (iii) 34 separate options (including torture, mental torture, unnecessary pain, victim bound or gagged) im a section on special aggravating features of the offense (S.E. 15, Q. 47 A & B); as well as (iv) extensive entries for the respective roles of co-perpetrators. (S.E. 16-18, Q. 47-48). Finally, the "Narrative Summary" section instructs the coder to include "all facts" and "any special circumstances that are not covered in the preceding questions." (S.E. 36).

Respondent faults the Baldus data because of ostensible "'errors in coding the questionnaire'" (Resp. Br. 2), which it says are reflected in "numerous inconsistencies between the coding for the Procedural Reform Study and the Charging and Sentencing Study." (Resp. Br. 18). The District Court, noting these "mismatches" between the PRS and the CSS questionnaires, concluded that coding errors pervaded the study. (J.A. 137-39).

Respondent's challenge to the accuracy of the data entries, however,

In sum, the charge that "the collective horrors of [the Utah case]... cannot be reduced to neatly coded variables," (WLF Br. 24), is wide of the mark. Professor Baldus's questionnaires would have captured all relevant factors in the Utah case, including one factor amici have misstated -- the substantially different involvement of the two Utah defendants. See State v. Andrews, 574 F.2d 709 (Utah 1977).

did not entail any actual comparison of Baldus's questionnaires with the underlying files from which the data were drawn. Instead, respondent's expert simply ran a computer check on items from cases that were included in both the PRS and CSS studies. The expert admitted that he made no attempt to compare the coding "protocols" from the PRS and CSS studies, to see whether the ostensibly "mismatched" items had been coded according to different instructions. (Fed. Tr. 1447).9

<sup>9</sup> All CSS coders were law students who were carefully selected (Fed. Tr. 301-03) and extensively trained. (Fed. Tr. 309-11). Coding decisions were guided by a comprehensive written "protocol" developed by Professor Baldus (see DB 43) which contained hundreds of instructions on general coding issues and on rules for coding specific items. (Fed. Tr. 310-11). During the data collection period, a coding supervisor reviewed a large proportion of all completed questionnaires on a daily basis. (Fed. Tr. 401-03). Entries were ultimately checked by computer for internal inconsistencies. (Fed. Tr. 595-99).

In fact, Professor Baldus testified that the instructions often varied significantly. For example, the PRS coders were required to draw inferences, if reasonable, from the file data; in the CSS study, coders were instructed not to draw inferences if information was not present in the file. (Fed. Tr. 367). Respondent was eventually forced to concede, "I don't believe [our expert] is indicating either one is necessarily right or wrong in his judgment. He's just indicating he's done a computer count and found these inconsistencies." (Fed. Tr. 1444).

Professor Baldus, however, did conduct a broad reanalysis of the alleged mismatches, and reported that approximately one percent were attributable to data entry, coding, or key punch error:

[T]hat translates into an error rate of approximately one-half

of one percent in each of the two studies. However, we found on further examination that . . . the error rate in the Procedural Reform Study was higher than it was in the Charging and Sentencing Study.

(Fed. Tr. 1719-20). Since the findings presented to the District Court came largely from the CSS study, the relevant error rate was very low.

"Unknowns" -- Respondent poses one final data collection issue -- the number of items that were coded "unknown" in the studies, and Professor Baldus's treatment of those unknowns in his analyses. (Resp. Br.19). Throughout the CSS study, Professor Baldus's coders were instructed to enter a "1" if a fact were "expressly stated in the file", a "2" if the fact was "suggested by the file but not specifically indicated," a blank if the fact were not present in the case, and a "U" if the coder could

not classify the item based on the file.

(Fed. Tr. 444-45). Once statistical analysis began, the "U" was recoded as "not present."

In his testimony, Professor Baldus examined one aggravating variable -that the "victim pled for his life" -to clarify the logic behind this standard coding procedure. If there had been witnesses present during the crime, he explained, a coder would code the variable either present or absent, depending on the witnesses' accounts. But in the absence of witnesses or other evidence, Baldus reasoned that one could draw no inference either way, and the item would be coded "U." (Fed. Tr. 1685-86; see also id. 1155-58).

This explanation casts in a radically different light the District Court's ominous-looking list of variables coded "U" in more than ten

Many involve either state-of-mind or relational variables that are often unknown to any outside investigator. For example, "Defendant's Motive was Sex" would be important if known to a prosecutor or jury. If the fact could be neither eliminated nor confirmed from the evidence, however, Baldus's rule would be to code it "unknown" and ultimately discount its impact either way by treating it as non-existent.

The District Court challenged the basic logic of this coding treatment: "the decision to treat the 'U' factors as not being present in a given case seems highly questionable . . . it would seem that the more rational decision would be to treat the 'U' factors as being present." (J.A. 139). Yet neither petitioner's experts (Fed. Tr. 1684-90) (Baldus); Fed. Tr. 1761-63 (Berk)), nor

respondent's experts (Fed. Tr. 1502-04; (Katz); Fed. Tr. 1656-58 (Burford)) suggested that a "U" should be coded as "1" or "present" for purposes of Indeed, Dr. Berk, analysis. petitioner's rebuttal expert, testified that the National Academy of Science expressly considered this issue during its two-year study of sentencing research and endorsed the very approach Baldus adopted. (Fed. Tr. 1761-63). The District Court's conclusion that a contrary code should have been used is entirely baseless. 10

<sup>10</sup>Moreover, Baldus testified that he conducted a series of alternative analyses to test the District Court's assumptions. (See generally Fed. Hab. Tr. 1693-1705 and S.E. 64-66). He recoded unknowns as "1" or "present" just as the Court had recommended. The effects on racial disparities "were within a percentage point of one another and all the coefficients that were statistically significant in the one analysis were in the other." (Fed. Tr. 1701). Another alternative analysis, employing "list-wise deletion" of all cases with "U" codes -- a procedure

# B. The Effect of Multicollinearity

Both respondent (Resp. Br. 2; 20-21) and the District Court (J.A. 150-53), decry "[m]ajor problems" presented by the phenomenon of "multicollinearity," which, they assert, invariably "distort[s] the regression coefficients in an analysis." (Resp. Br. 20).

Their concern is misguided.

Professor Gross, in his thorough examination of the district and circuit court opinions in this case, has directly addressed the point:

Multicollinearity occurs, in the court's view, whenever 'there is any degree of interrelationship among the variables,' and it distorts the regression coefficients. . This is false. There is nothing in the assumptions of multiple regression

recommended by the State's principal expert, (Fed. Tr. 1501-02) -- also had no adverse effect upon Baldus' original findings. (Fed. Tr. 1695-96; see S.E. 64). Indeed it increased the race-of-victim coefficient by two percentage points.

analysis that requires uncorrelated regressors; indeed, multiple regression analysis is primarily useful in analyzing data in which there are correlations among the predictor variables."

Gross, Race and Death: The Judicial Evaluation of Evidence of Discrimination in Capital Sentencing, 18 U.C. Davis L. Rev. 1275, 1292 n.83 (1985). The social scientists who appear in this Court as amici strongly concur in this judgment. (Brief Amici Curiae for Dr. Franklin M. Fisher, et al., 25-26). See also Fisher, Multiple Regression in Legal Proceedings, 80 Colum. L. Rev. at 713. Moreover, the issue is not one on which the record is silent. Petitioner's experts testified without contradiction that the effects of multicollinearity, far from increasing the Baldus findings of racial influences in the Georgia system, would, if anything, tend to

dampen their appearance by decreasing their reported statistical significance.

(Fed. Tr. 1281-82; 1782). Since Professor Baldus found racial disparities that were highly statistically significant despite any multicollinearity, the entire issue is a spurious concern.

# C. The "Direct Rebuttal Evidence"

Apart from his attacks on Professor Baldus's data sources, discussed above, respondent offered virtually no rebuttal evidence to undermine either the stark racial disparities found or their significance. His reference to "direct rebuttal evidence . . . that contradicted any prima facie case of system-wide discrimination, if one had been established" (Resp. Br. 4) is misleading. This reference is to an hypothesis, put forward by his expert at the federal hearing, that Georgia's

racial disparities might be explained by the fact that white-victim cases are, on the whole, more aggravated than black-victim cases, and thus that they receive deservedly harsher penal treatment. (Resp. Br. 6; see J.A. 169-70).

Respondent's hypothesis, like any other, might easily have been tested by determining whether white- and blackvictim cases at the same levels of aggravation are, in fact, similarly treated. (Fed. Tr. 1664). Although respondent's expert admitted on crossexamination that such critical testing "would be desirable" (Fed. Tr. 1613), he chose not to undertake it. Instead, respondent rested his case on untested assumptions of precisely the sort condemned by the Court as inadequate in Bazemore v. Friday, 92 L.Ed.2d at 333 n.14. See, e.g., Trout v. Lehman, 702 F.2d at 1102.

Petitioner, however, did not permit these assumptions to go unexamined. Instead, his experts addressed this hypothesis directly (Fed. Tr. 1297; 1729-32;1759-61), tested it thoroughly (Fed. Tr. 1291-96; see GW 5, 6, 7, 8; see also DB92), and conclusively proved that racial disparities in Georgia are not the result of any differences in average aggravation levels between white- and black-victim cases. (Fed. Tr. 1732). One powerful indicator of this finding appears in the Supplemental Exhibits at page 72. The different bands for white- and black-victim cases reveal that as aggravation levels rise, a substantial gap in the death-sentencing rate opens between cases at the same level of aggravation. Nothing in respondent's hypothesis addresses, much

### less refutes, this central truth.11

# D. <u>The Suggestion of Contrary Findings</u>

Respondent quotes the Court of Appeals for the proposition that Professor Baldus's first study, the PRS, "revealed no race of defendant effects

<sup>11</sup>one brief submitted by amici speculates, despite the evidence, that race-of-victim disparities in Georgia surely could not reflect decisionmaker bias, since "the victim is perforce absent from the trial and the victim's race is rarely a matter of relevant concern at trial." (WLF Br. 4). The remark betrays lack of familiarity with the record and with the normal course of capital trials. As a matter of record, Professor Baldus's data demonstrate that of the reported racial discrimination occurs through the pretrial and presentencing decisions of Georgia prosecutors, who invariably know the race of the victims involved. As a matter of trial practice, moreover, it is the rare Georgia case where the jury is not exposed, during the trial itself, to photographs of the victim, to testimony from the victim's family, or to other clear indicators of the victim's race. In addition, pretrial exposure to newspaper accounts of homicides, as well as local knowledge of the victim among jurors in rural areas and small towns, often gives most jurors knowledge of the victim's race well before trial.

whatsoever and revealed unclear race of victim effects." (Resp. Br. 4, citing J.A. 247). Several amici also suggest that contrary findings on the race-ofvictim issue have been reported by other researchers. (See WLF Br. 4; 18-20) (Bureau of Justice Statistics); WLF Br. 18-19 n.4 (Note, 33 Stan. L. Rev. 75 (1980); Cal. Br. 12 n.5 (Kleck, 9 Law & Human Behavior 271 (1985).) None of these assertions is accurate. Every researcher who has ever studied Georgia's post-Furman sentencing patterns has found a significant raceof-victim effect. (See the articles cited in petitioner's principal brief at page 51 n.16.)

The Court of Appeals' adverse remark about the race-of-victim findings in the Procedural Reform Study is unsupported by any citation and is wrong. (J.A. 247). The record reveals that many of

Professor Baldus's PRS analyses did find strong racial effects. For example, DB 98, included in the Supplemental Exhibits at 58, reports highly statistically significant race-of-victim effects, using PRS data, for a wide range of statistical models, including 5-variable, 9-variable, 61-variable, and 164-variable models. Baldus reported and commented upon many other strong race-of-victim effects disclosed by his analysis of the PRS data. (See Fed. Tr. 905-914; 917-919; 939-40; DB95; DB96.)

One amici brief suggests that statistics compiled by the Bureau of Justice Statistics of the United States Department of Justice, which report a higher death-sentencing rate for white defendants than for black defendants, "discredit petitioner's sweeping contention that anti-black discrimination permeates the capital

sentencing process." (WLF Br. 18). In fact, these BJS statistics are consistent with Professor Baldus's own findings. For example, Baldus found that 7 of every 100 white defendants, but only 4 of every 100 black defendants, received a death sentence in Georgia during the 1973-1979 period. (See S.E. 46). Upon further analysis, however, he concluded that the differences are not explained by any "anti-white" bias in Georgia, but rather by the fact that most white defendants in Georgia murder other whites, while most black defendants murder other blacks. (See S.E. 47) The powerful influence of the victim's race in Georgia death-sentencing decisions simply overwhelms the less powerful race-of-defendant effects.

Amici Wa Ington Legal Foundation et al. also mention "other reputable

studies [that] undercut the claims of victim-anchored racial discrimination in capital sentencing." (WLF Br. 18 & n.4). They cite a single work, a student note reporting a limited analysis of data from a four-year period collected in another state. Note, 33 Stan. L. Rev. 75 (1980). Even this study, however, largely replicates Baldus's principal findings. The student found that "black offenders who killed whites were convicted of first degree murder about four times more often than black offenders who killed blacks," id. at 87, and that such defendants received death sentences nearly seven times as often. Id. While the student asserted that "the inference of discrimination collapses" when the analysis is restricted to felony-related murder cases, id.at 88, his data actually reveal the following death-sentencing rates among all felony-related homicides:

Black kills white 5 of 61 8% White kills white 4 of 52 8% Black kills black 1 of 26 4%

White kills black 0 of 3 0%

Id. at 89, Table 4. Although the small number of felony-related murder cases involved precludes a statistically significant finding, the pattern of results supports Professor Baldus's claims.

Other <u>amici</u> refer the Court to Professor Kleck's article for "a recent, objective review of some of these studies and conclusions." (<u>Id.</u>) Professor Kleck's article is indeed instructive; it concludes that while most hypotheses of racial discrimination in the criminal justice system are overstated, prior research does support the following conclusions:

- (1) The death penalty has not generally been imposed for murder in a fashion discriminatory toward blacks, except in the South. (emphasis added) . . .
- (5) There appears to be a general pattern of less severe punishments of crimes with black victims than those with white victims, especially in connection with the imposition of the death penalty.

Kleck, Life Support for Ailing Hypotheses: Modes of Summarizing the Evidence for Racial Discrimination in Sentencing, 9 Law & Human Behavior 271, 272 (1985). Professor Kleck thus directly ratifies the principal results reported in this case, and reaffirms Professor Baldus's observation that the "triangulation" of research findings provides one fundamental reason for believing "that there are real race effects operating in the charging and sentencing system in this state." (J.A. 48).

### CONCLUSION

The history of the administration of the death penalty in Georgia is a history marred by racial discrimination. Over 81% of all those executed beween 1930 and 1970 were black, (see United States Department of Justice, Capital Punishment 1930-1970 at 13), just as 6 out of 7 executed in the post-Furman period -- under Georgia's revised capital statutes-have been blacks whose victims were wnite. (Brief for the Congressional Black Caucus, et al., as Amici Curiae, at 5.) Although respondent continues to insist that Georgia's post-Furman system is "functioning as it was intended to function," (Resp. Br. 5), Professor Baldus has amply demonstrated the existence of strong race-of-victim disparities, as well as race-of-defendant disparities against blacks whose victims are white. This discrimination occurs exactly where it might have been predicted -- among the "midrange" of moderately aggravated cases, where petitioner McCleskey's own case is found. 12

The Eighth and Fourteenth Amendments surely require no more of petitioner than this evidence, which renders it "more likely than not" that racial

<sup>12</sup>Respondent quarrels with this mid-range analysis -- hypothesizing that "different rankings" could be given to the cases "depending on what variables might be included in a particular regression." (Resp. Br. 22). Yet predictably, respondent has offered no analysis in which Georgia racial results are different. Respondent's expert, who spent over 1000 hours prior to the federal hearing reanalyzing the Baldus data (Fed. Tr. 1576) never uncovered any defensible model or any set of variables that could explain, or even diminish significantly, the role played by race as a determinant in the Georgia capital system.

discrimination has been at work in Georgia's capital sentencing system during the 1973-1979 period. The State's demand for still further proof is certainly not, at this juncture, a legitimate plea for more careful examination. It is instead a heedless request that Georgia be permitted to continue its age-old capital sentencing practices -- despite the facts, despite the law, despite the Constitution.

Amici have contended that it would be "repugnant to any decent sense of law and justice" for a capital inmate to "escape an otherwise valid death sentence by invoking the race of his victim." (WLF Br. 2). That's not what this case is about. The real issue is whether petitioner and other Georgia inmates have received their death sentences in part because of the race of their victims. Decency, law, and

justice are properly invoked to guard against such a possibility, not to condone it.

The Court should reverse the judgment of the Court of Appeals.

Dated: October 3, 1986

Respectfully submitted,

JULIUS L. CHAMBERS
JAMES M. NABRIT, II

\*JOHN CHARLES BOGER
DEVAL L. PATRICK
VIVIAN BERGER
99 Hudson Street
New York, New York 10013
(212) 219-1900

ROBERT H. STROUP 141 Walton Street Atlanta, Georgia 30303

TIMOTHY K. FORD 600 Pioneer Building Seattle, Washington 98104

ANTHONY G. AMSTERDAM

New York University
School of Law

40 Washington Square South
New York, New York 10012

\*Attorney of Record

BY Chal By

# FOR ARGUMENT

### IN THE

# Supreme Court of the United States

OCTOBER TERM, 1986

WARREN McCLESKEY,

Petitioner.

V.

RALPH M. KEMP,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for The Eleventh Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE
AND BRIEF AMICUS CURIAE OF THE
INTERNATIONAL HUMAN RIGHTS LAW GROUP
IN SUPPORT OF PETITIONER

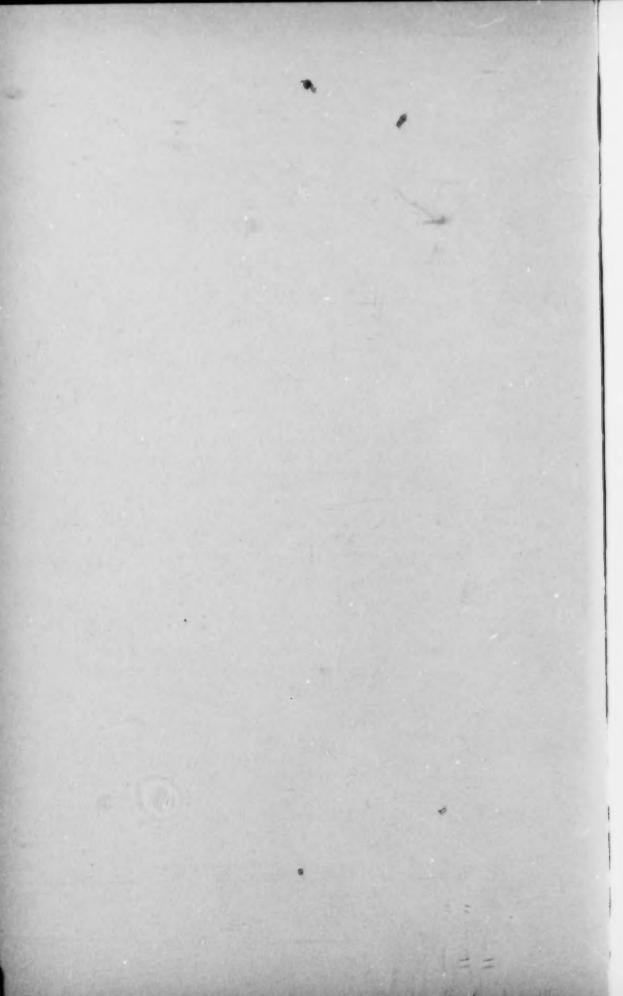
Of Counsel:

STEVEN M. SCHNEEBAUM PATTON, BOGGS & BLOW 2550 M Street, N.W. Washington, D.C. 20037

- \* RALPH G. STEINHARDT 720 20th Street, N.W. Washington, D.C. 20052 (202) 676-5739
- \* Counsel of Record

LARRY GARBER
INTERNATIONAL HUMAN RIGHTS
LAW GROUP
722 Fifteenth Street, N.W.
Suite 1000
Washington, D.C. 20005

258



# MOTION OF THE INTERNATIONAL HUMAN RIGHTS LAW GROUP TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONER

Pursuant to Rule 36.3 of the Rules of this Court, the International Human Rights Law Group (the Law Group) moves for leave to file the attached brief Amicus Curiae in support of Petitioner. The Law Group is a non-profit organization of international lawyers and scholars, which, through litigation, publication, and other public activism, seeks to promote respect for human rights norms in all nations, including the United States.

By order dated October 7, 1985, this Court allowed the Law Group to file a brief Amicus Curiae in support of the petition for a writ of certiorari in this case. Having argued in favor of the propriety of review, the Law Group now moves to file a brief on the merits. In particular, Amicus wishes to submit for this Court's consideration the argument that the en banc decision below approved an admittedly racially-discriminatory system for the imposition of the death penalty, which violates peremptory norms of international law. In failing to consider international law as a relevant source of the rule of decision, the Eleventh Circuit's opinion violates the Supremacy Clause of the Constitution as interpreted. At a minimum, the decisions of this Court oblige the Eleventh Circuit to consider international standards in determining whether Petitioner's sentence was "cruel and unusual" within the meaning of the Eighth Amendment.

Amicus also brings a unique institutional perspective to these proceedings. Between 1980 and 1984,

the Law Group sought to litigate the very issues of race discrimination raised in this case before the Inter-American Commission on Human Rights, an instrumentality of the Organization of American States. On October 3, 1984, the Commission held the Law Group's petition inadmissible on certain procedural grounds and in particular on the representation of the United States that U.S. courts should be allowed to consider the Law Group's data and argumentation. Amicus files this brief in order to lay before this Court these legal and empirical submissions.

Amicus is not aware of any other presentation of these data or arguments to this Court. Counsel for Petitioner has consented to the filing of this brief. Amicus sought the consent of counsel for Respondent who declined to provide it, necessitating this motion.

Respectfully submitted,

RALPH G. STEINHARDT 720 20th Street, N.W. Washington, D.C. 20052 (202) 676-5739

Counsel of Record for the INTERNATIONAL HUMAN RIGHTS LAW GROUP

August 21, 1986

# TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF THE AMICUS	1
SUMMARY OF ARGUMENT	2
Argument	4
I. DATA SUBMITTED TO THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS ESTABLISH THAT THE DEATH PENALTY IS IMPOSED IN A RACIALLY DISCRIMINATORY MANNER IN THE STATE OF GEORGIA.	4
II. THE EXISTENCE OF RACIAL DISCRIMINATION AS ACKNOWLEDGED BY THE COURT OF APPEALS FOR THE ELEVENTH CIRCUIT EN BANC VIOLATES A PEREMPTORY NORM OF INTERNATIONAL LAW	8
III. THE ELEVENTH CIRCUIT WAS RE- QUIRED TO CONSTRUE THE GEORGIA DEATH PENALTY STATUTE CONSIST- ENTLY WITH PERTINENT INTERNA- TIONAL LAW AND FAILED TO DO SO.	
CONCLUSION	17

TABLE OF AUTHORITIES
Cases: Page
Barcelona Traction Light and Power Co., Ltd., [1970] I.C.J. Rep. 32
Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313 (1971) 4
Chisolm v. Georgia, 2 Da. 419 (1793)
Coker v. Georgia, 433 U.S. 584 (1977)
Cook v. United States, 488 U.S. 102 (1983) 15
Eddings v. Oklahoma, 455 U.S. 104 (1982) 4
Enmund v. Florida, 458 U.S. 782 (1982) 16
Fernandez v. Wilkinson, 505 F. Supp. 787 (D. Kan. 1980), aff'd sub nom. Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382 (l0th Cir. 1981) 14
Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980)
First National City Bank v. Banco Para el Commercio Exterior de Cuba, 103 S.Ct. 2591 (1983)
Lauritzen v. Larsen, 345 U.S. 571 (1953) 15
Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276, [1971] I.C.J. Rep. 57
McCleskey v. Kemp, 753 F.2d 877 (11th Cir. 1985) (en banc)
McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10 (1963)
Murray v. The Charming Betsy, 6 U.S. (2 Cranch) 64 (1804)
The Nereide, 13 U.S. (9 Cranch) 388 (1815) 13
North Sea Continental Shelf Cases, [1969] I.C.J. Rep. 37
The Paquete Habana, 175 U.S. 677 (1900)

Table of Authorities Continued	
Pag	ge
Procunier v. Navarette, 434 U.S. 555 (1978)	4
Respublica v. DeLongchamps, 1 U.S. 119, 1 Dall. 111 (O.&T. Pa. 1784)	14
South West Africa Cases (Second Phase), [1966] I.C.J.	10
Spinkelink v. Wainwright, 578 F.2d 582 (5th Cir. (1978), cert. denied, 404 U.S. 976 (1979)	6
Talbot v. Seeman, 5 U.S. (1 Cranch) 1 (1801)	15
Trop v. Dulles, 356 U.S. 86 (1958) 3, 15,	16
Vance v. Terrazas, 444 U.S. 252 (1980)	4
Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977)	17
Ware v. Hylton, 3 U.S. (3 Da.) 199 (1796)	13
Weinberger v. Rossi, 456 U.S. 25 (1982)	15
Wood v. Georgia, 450 U.S. 261 (1981)	4
TREATIES, DECLARATIONS, STATUTES, AND REGULATIONS	S
American Convention on Human Rights, signed Nov. 22, 1969, OAS Official Records OEA/Ser. K/XVI/i.i, Doc. 65, Rev. 1, Corr. 1 (Jan. 7, 1970)	9
American Declaration on the Rights and Duties of Man, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States, held at Bogota, Colombia (1948), OEA/Ser. L./ V/I. 4 Rev. (1965)	10
Declaration of Social Progress and Development, adopted Dec. 11, 1969, G.A.Res. 2542, 24 U.N. GAOR, Supp. (No. 30) 49, U.N. Doc. A/7630 (1969)	10

Table of Authorities Continued	
	Page
Declaration on the Promotion Among Youth of the Ideals of Peace, Mutual Respect and Understanding Between Peoples, adopted Dec. 7, 1965, G.A. Res. 2037, 20 U.N. GAOR, Supp. (No. 14) 40, U.N. Dec. A/6015 (1965)	
The International Convention on the Elimination of All Forms of Racial Discrimination, opened for signature March 7, 1966, 660 U.N.T.S. 195	
International Covenant on Civil and Political Rights, adopted Dec. 16, 1966, G.A. Res. 2200A, 21 U.N. GAOR, Supp. (No. 16)	
International Covenant on Economic, Social, and Cultural Rights, adopted Dec. 16, 1966, G.A. Res. 2200A, 21 U.N. GAOR, Supp. (No. 16)	
Organization of American States Charter, signed April 30, 1948, entered into force December 13, 1951, 2 U.S.T. 2394, T.I.A.S. No. 2361	
United Nations Charter, signed June 26, 1945, entered into force October 24, 1945, 59 Stat. 1031, T.S. No. 993	9
United Nations Declaration on the Elimination of All Forms of Racial Discrimination, adopted Nov. 20, 1963, G.A. Res. 1904, 18 U.N. GAOR Supp. (No. 15) 35, 36, U.N. Doc. A/5515 (1963)	
Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 (1948)	
Vienna Convention on the Law of Treaties, adopted May 22, 1969, entered into force, Jan. 17, 1980, U.N. Doc. A/CONF. 39/27 (1969), reprinted in 63 AMER. J. INT'l L. 875 (1969), 8 INT'L LEG. MAT. 679 (1969)	!
LEGISLATIVE MATERIALS:	
S. Exec. Doc. L., 92d Cong., lst Sess. (1971)	. 9
MISCELLANEOUS:	

# Table of Authorities Continued

	Page
American Law Institute, Restatement of Foreign Relations Law of the United States (Revised) (1986)	12, 13
Baldus, et al., Monitoring and Evaluating Contemporary Death Sentencing Systems: Lessons From Georgia, 18 U.C. DAVIS L. REV. 1375	ı
(1985)	7
Barnett, Some Distribution Patterns for the Georgia Death Sentence, 18 U.C. DAVIS L. REV. 1327	7
(1985)	7
Gross, Race and Death: The Judicial Evaluation of Evidence of Discrimination In Capital Sentence ing, 18 U.C. DAVIS L. REV 1275 (1985)	-
Henkin, International Law as Law in the United States, 82 MICH. L. REV. 1555 (1984)	l . 13
Lillich, "The Role of Domestic Courts in Enforcing International Human Rights Law," Guide To In ternational Human Rights Practice (1984)	-
McDougall, Lasswell, & Chen, Human Rights and World Public Order (1980).	i . 11
McKean, Equality and Discrimination Under International Law (1983)	. 11
Memorial of the United States, The Case Concerning United States Diplomatic and Consular Staff in Tehran (United States v. Iran), [1980] I.C.J.	
Pleadings 181 (January 1980)	
Op. Att'y Gen. 27 (1972)	. 13
Santa Cruz, Racial Discrimination, U.N. Doc. E/CN 41 Sub. 2/307/Rev. 1, 28 (1971).	. 10
Zeisel, Race Bias in the Administration of the Death Penalty: The Florida Experience, 95 HARV. L REV. 456 (1981)	



### IN THE

# Supreme Court of the United States

OCTOBER TERM, 1986

No. 84-6811

WARREN McCLESKEY,

Petitioner.

RALPH M. KEMP,

Respondent.

On Writ Of Certorari to the United States Court of Appeals For the Eleventh Circuit

BRIEF AMICUS CURIAE OF THE INTERNATIONAL HUMAN RIGHTS LAW GROUP IN SUPPORT OF PETITIONER

## INTEREST OF AMICUS

The International Human Rights Law Group is a non-profit organization of international lawyers and scholars which seeks to promote the observance of international human rights norms by providing legal assistance and information to individuals and groups on a pro bono basis; representing clients in international forums; and participating amicus curiae in U.S. litigation involving international human rights norms.

The Law Group respectfully submits and intends to demonstrate that this case requires consideration of relevant human rights law.

The Law Group also has a unique and direct institutional stake in the resolution of this case. In 1980, the Law Group petitioned the Inter-American Commission on Human Rights, an instrumentality of the Organization of American States (the Commission), to declare that capital sentences in the United States are imposed in a racially discriminatory manner. In particular, the Law Group argued that the death penalty is imposed disproportionately on those defendants the victims of whose crimes are white and that such discrimination based upon the race of the victim was in violation of treaties to which the United States is a party. After receiving statistical evidence similar to that presented below by Petitioner herein, the Commission held the Law Group's petition inadmissible on procedural grounds, and effectively deferred the Law Group's international claims pending an authoritative disposition of the issue by American courts.

The Law Group submits this brief in order to lay before this Court the race discrimination data submitted to the Commission, and to demonstrate that the *en banc* court below failed to construe the Georgia death penalty statute consistently with binding international law, thereby committing reversible error.

## SUMMARY OF ARGUMENT

With remarkable candor, the en banc Court of Appeals for the Eleventh Circuit accepted the factual findings of Petitioner's studies, namely that no factors other than race could account for the marked increase in capital sentences among those defendants whose



victims were white. Indeed, the court below expressly "assum[ed] the validity of the research" and acknowledged "that it proves what it claims to prove." McCleskey v. Kemp, 753 F.2d 877, 886 (11th Cir. 1985) (en banc). The conclusion as a matter of law that this evidence established no violation of the Eighth and Fourteenth Amendments to the U.S. Constitution does not exhaust the legal analysis the court was required to undertake. In particular, the en banc court failed to consider international law as a pertinent source of the rule of decision. Under The Paquete Habana, 175 U.S. 677 (1900) and its progeny, the Georgia death penalty statute should have been considered in light of the peremptory norm of international law condemning racial discrimination-a customary norm to which the United States is bound beyond peradventure. The failure to consider an applicable source or guarantor of Petitioner's rights is reversible error. At a minimum, the case should be remanded to the Eleventh Circuit Court of Appeals for its analysis of the limits imposed by this international obligation on the discretion of State officials to administer the death penalty.

In addition, under *Trop v. Dulles*, 356 U.S. 86 (1958) and its progeny, the Eleventh Circuit should have consulted international standards in determining the contours of the Eighth Amendment's ban on cruel and unusual punishment.

Confining itself to the argument that each of Questions Presented 1 through 5 should have been considered in light of applicable international law,

Although the international issues raised by Amicus were not presented to the courts below, this Court has established that



Amicus offers no opinion as to the circuit court's disposition of purely domestic legal issues.

#### ARGUMENT

I. DATA SUBMITTED TO THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS AND TO THE COURT BELOW ESTABLISH THAT THE DEATH PENALTY IS IMPOSED IN A RACIALLY DISCRIMINATORY MANNER IN THE STATE OF GEORGIA.

On August 6, 1980, Amicus submitted a petition to the Inter-American Commission on Human Rights, an instrumentality of the Organization of American States, alleging that the United States imposed the death penalty in a racially discriminatory manner. The data submitted to the Commission established a pronounced pattern of racially-based disparities in death sentencing based on the race of the victim. In particular, the evidence showed that a person convicted in the State of Florida of murdering a white person was ten times more likely to receive the death penalty than one convicted of murdering a black person.<sup>2</sup> In

it has the power to consider relevant issues raised in a case "in the interest of justice," irrespective of whether those issues were previously raised, Wood v. Georgia, 450 U.S. 251, 265 n. 5 (1981). The exercise of that power is especially appropriate in capital cases. Eddings v. Oklahoma, 455 U. S. 104 (1982). See also, Vance v. Terrazas, 444 U.S. 252 (1980); Procunier v. Navarette, 434 U.S. 555, 559-60 n. 6 (1978); Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313, 320-21 n. 6 (1971).

<sup>&</sup>lt;sup>2</sup> The data are described in the affidavit of Professor William J. Bowers, which is attached hereto in the Appendix. The Florida data appear on pp. 2a and 5a.

Texas, the ratio was eighteen to one.<sup>3</sup> In Georgia, where this litigation arose, it was twelve to one, a figure which reinforces the conclusions of the study submitted by Petitioner herein. More specifically, the Law Group's statistician, Professor William Bowers of Northeastern University, produced the following tabulation:

### PROBABILITY OF RECEIVING THE DEATH SENTENCE FOR CRIMINAL HOMICIDE BY RACE OF OFFENDER AND VICTIM IN GEORGIA FROM THE EFFECTIVE DATE OF THE POST-FURMAN STATUTE THROUGH 1977°

	Estimated	Persons Sentenced	Probability of a Death
D	Number of	to Death	Sentence
Race of Offender	Offenders <sup>b</sup>		.038
White	1082	41	
Black	2716	49	.018
Race of Victim			
White	1265	76	.060
Black	2529	25	.005
Offender/Victim			
Racial Combinations			
Black Kills White	258	37	.143
White Kills White	1006	39	.039
Black Kills Black	2458	12	.005
White Kills Black	71	2	.028
All Offenders	3798	90	.024

a Data Sources: Supplementary Homicide Reports on criminal homicide data from April 1973 through December 1976, supplied by the Uniform Crime Reporting Program, Federal Bureau of Investigation, United States Department of Justice, Washington, D.C.; (2) Supplementary Homicide Reports on criminal homicide data for 1977, supplied

<sup>3</sup> Id., at pp. 4a and 7a.

by the Criminal Activity Reporting Unit, Georgia Bureau of Investigation, Georgia Crime Information Center, Atlanta, Georgia; (3) Vital Statistics tabulations on willful homicide from April 1973 through December 1977, supplied by the Office of Health Services Research and Statistics, Division of Physical Health, Atlanta, Georgia; (4) Persons sentenced to death from April 1975 through December 1977, supplied by Georgia Committee Against the Dealth Penalty, Atlanta, Georgia.

by multiplying the reported number of offenders in that category for the years 1976, 1977 (sources: 1, 2) by a victim-based adj. ament factor to correct for undercoverage. The adjustment factor 4.453 equals the number of homicide victims from April 1973 through December 1977 (source: 3) divided by the number of homicide victims in the years 1976, 1977 (sources: 1,2).

Thus, although black defendants on average were less likely than white defendants to receive the death sentence (.018 versus .038), black defendants who killed white people were more likely than any other group to receive that sentence by several orders of magnitude. And when the data are controlled for defendant's race, as noted, the defendant of either race who kills a white person is twelve times more likely to be sentenced to death than the defendant of either race who kills a black person (.060 versus .005).

In the proceedings before the Inter-American Commission, the United States never challenged the validity of these data or the statistical methods employed to produce them. Rather, the United States opposed the petition almost exclusively on the grounds that domestic remedies for the redress of such discrimination had not been exhausted, despite the denial of certiorari in Spinkelink v. Wainwright, 578 F.2d 582 (5th Cir. 1978), cert. denied, 404 U.S. 976 (1979). The United States assured the Commission that U.S. courts, including this Court, remained receptive to evidence demonstrating the fact and extent of discrimination, and that they would respond fully and

fairly to any such demonstration. Opposition of the United States, Case 7465, Inter-American Commission on Human Rights (June 16, 1981). In light of this representation and on other procedural grounds, the Commission denied the petition on October 3, 1984, noting that the statistical evidence submitted was more appropriately directed to a domestic court in each individual case.

The Law Group's data, unchallenged and stark as they are standing alone, become especially compelling in light of other consistent and sophisticated demonstrations of the same phenomenon, including the Baldus study in the instant litigation and multiple reports in the scholarly literature. See e.g., Zeisel, Race Bias in the Administration of the Death Penalty: The Florida Experience, 95 HARV. L. REV. 456 (1981); Gross, Race and Death: The Judicial Evaluation of Evidence of Discrimination in Capital Sentencing, 18 U.C. DAVIS L. REV. 1275 (1985); Barnett, Some Distribution Patterns for the Georgia Death Sentence, 18 U.C. DAVIS L. REV. 1327 (1985); Baldus, et al., Monitoring and Evaluating Contemporary Death Sentencing Systems: Lessons From Georgia, 18 U.C. DAVIS L. REV. 1375 (1985). To Amicus's knowledge, the only sustained attack on any of these studies is the en banc court's treatment of the Baldus study in the decision below. Though lengthy, that attack suffers from inconsistency4 and an apparent un-

<sup>&</sup>lt;sup>4</sup> Despite its apparent rejection of the Baldus data in parts of its opinion, the *en banc* court was also willing to "assume the validity of the research." 753 F.2d at 886, acknowledging "that it proves what it claims to prove." *Id*.

familiarity with rudimentary mathematics.<sup>5</sup> The evidence remains persuasive that there exists a marked, significant disparity in the susceptibility of certain categories of defendants to the ultimate sanction and that that disparity is determined by race. The values placed on white and black lives in Georgia are demonstrably unequal.

II. THE EXISTENCE OF RACIAL DISCRIMINATION AS ACKNOWLEDGED BY THE COURT OF APPEALS FOR THE ELEVENTH CIRCUIT EN BANC VIOLATES A PEREMPTORY NORM OF INTERNATIONAL LAW.

The right to be free from official government-sponsored discrimination on the basis of race is so universally accepted by nations as to constitute a peremptory norm of international law.<sup>6</sup> It is included

<sup>&</sup>lt;sup>5</sup> For example, the Eleventh Circuit focused on the ".06" disparity by race of victim in overall death sentencing rates, as reported by Baldus. It consistently viewed this as a six percent disparity, 753 F.2d at 896, 899. But the figure is in fact a six percentage point disparity, raising the overall death sentence rate from .05 to .11, a percentage increase of 120%, not 6%.

Petitioner and other Amici offer a thorough critique of the Eleventh Circuit's statistical acumen. See Motion for Leave To File Brief Amici Curiae and Brief Amici Curiae For Dr. Peter W. Sperlich, Dr. Marvin E. Wolfgang, Professor Hans Zeisel and Professor Franklin E. Zimring in Support of the Petition for Writ of Certiorari, filed herein on June 27, 1985.

<sup>&</sup>lt;sup>6</sup> A peremptory norm of international law is a "norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." Vienna Convention on the Law of Treaties, adopted May 22, 1969, entered into force, January 17, 1980, U.N. Doc. A/Conf. 39/27 (1969), re-

in such fundamental texts as the Charter of the United Nations<sup>7</sup>, and the Charter of the Organization of American States,<sup>8</sup> both of which are treaties ratified by and binding upon the United States. Similar prohibitions are found in every comprehensive international treaty pertaining to human rights<sup>9</sup> and in

printed in 63 AMERICAN J. INT'L L. 875 (1969), 8 INT'L LEG. MAT. 679 (1969). Although the Vienna Convention has been signed but not ratified by the United States, the Department of State, in submitting the Convention to the Senate, stated that it "is already recognized as the authoritative guide to current treaty law and practice." S. Exec. Doc. L., 92d Cong., 1st Sess. (1971) at 1.

<sup>7</sup> U.N. Charter, signed June 26, 1945, entered into force October 24, 1945, 59 Stat. 1031, T.S. No. 933, at Article 55(c).

<sup>8</sup> O.A.S. Charter, signed April 30, 1948, entered into force December 13, 1951, 2 U.S.T. 2394, T.I.A.S. No. 2361, at Article 3(j).

<sup>9</sup> International Convenant on Civil and Political Rights, adopted December 16, 1966, G.A. Res. 2200A, 21 U.N. GAOR, Supp. (No. 16), Articles 2(a), 13, 26; International Covenant on Economic, Social, and Cultural Rights; adopted December 16, 1966, G.A. Res. 2200A, 21 U.N. GAOR, Supp. (No.16), Article 2(2); American Convention on Human Rights, signed Nov. 22, 1969, OAS Official Records OEA/Ser. K/XVI/i.i, Doc. 65, Rev. 1, Corr. 1 (Jan. 7, 1970), Articles 22(7) 22(9), 24; The International Convention on the Elimination of All Forms of Racial Discrimination, opened for signature March 7, 1966, 660 U.N.T.S. 195, Articles 1. 2. The United States has signed but not yet ratified each of these treaties. Under Article 18 of the Vienna Convention on the Law of Treaties, supra, the United States is obliged not to defeat the object and purpose of these conventions prior to their entry into force. In addition, those international agreements to which the United States is not a party may nevertheless create or evidence a customary norm which is equally authoritative and equally binding. North Sea Continental Shelf Cases, [1969] I.C.J. Rep. 37. Other treaties which prohibit racial discrimination are numerous international declarations and resolutions. 10 The most authoritative of these—the Universal Declaration of Human Rights 11—sets forth in various forms a basic guarantee of rights and freedoms "without distinction of any kind, such as race . . . [or] national or social origin," id., at Articles 2, 7, and 14. In international adjudication, the United States itself has invoked those provisions as evidence of the core human rights protected by international law. 12 The renunciation of official racial discrimination is reflected as well in the laws and constitutions of a vast majority of states, 13 and is conceived as the center-

catalogued in Appendix B to Amicus' Brief in Support of Petition for Certiorari, filed herein on July 8, 1985, at 8a-9a.

of Racial Discrimination, adopted Nov. 20, 1963, G.A. Res. 1904, 18 U.N. GAOR Supp. (no. 15) 35, 36, U.N. Doc. A/5515 (1963); American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States, held at Bogota, Columbia (1948), OEA/SER.L./V/I. 4 Rev. (1965), Articles II, XXCII; Declaration of Social Progress and Development, adopted Dec. 11, 1969, G.A. Res. 2542, 24 U.N. GAOR, Supp. (No. 30) 49, U.N. Doc. A/7630 (1969), Articles 1, 2; Declaration on the Promotion Among Youth of the Ideals of Peace, Mutual Respect and Understanding Between Peoples, adopted Dec. 7, 1965, G.A. Res. 2037, 20 U.N. GAOR, Supp. (No. 14) 40, U.N. Doc. A/6015 (1965), Principles 1, 3.

<sup>11</sup> G.A. Res. 217A(III), U.N. Doc. A/810 (1948).

<sup>&</sup>lt;sup>12</sup> Memorial of the United States, The Case Concerning United States Diplomatic and Consular Staff in Tehran (United States v. Iran), [1980] I.C.J. Pleadings 181, n. 3 (January 1980).

<sup>&</sup>lt;sup>13</sup> Santa Cruz, Racial Discrimination, U.N. Doc. E/CN. 41 Sub. 2/307/Rev. 1, 28 (1971). See South West Africa Cases (Second Phase), [1966] I.C.J. 4, 299 (Tanaka, J., dissenting).

piece of contemporary human rights norms in the writings of international law scholars.14

Recognizing this consistent and universal condemnation of racial discrimination, the International Court of Justice has concluded that "the principles and rules concerning the basic rights of the human person, including protection from . . . racial discrimination," constitute an international obligation of all states. Case Concerning The Barcelona Traction Light and Power Co., Ltd., [1970] I.C.J. Rep. 32. The International Court has also concluded that

to establish . . . and to enforce distinctions, exclusions, restrictions, and limitations exclusively based on grounds of race, colour, descent or national or ethnic origin . . . constitutes a denial of fundamental human rights [and] is a flagrant violation of the purposes and principles of the [U.N.] Charter.

Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276, [1971] I.C.J. Rep. 57. The cumulative power of this international consensus has led the American Law Institute to include "systematic racial discrimination" in its authoritative catalogue of fundamental violations of customary international law. American Law

<sup>&</sup>lt;sup>14</sup> See e.g., Lillich, "The Role of Domestic Courts in Enforcing International Human Rights Law," International Human Rights Practice (1984); McDougall, Lasswell & Chen, Human Rights and World Public Order 581-611 (1980). See generally, McKean, Equality and Discrimination Under International Law (1983); Henkin, The Rights of Man Today (1978).

Institute, Restatement of Foreign Relations Law of the United States (Revised) § 702(f) (1986).<sup>15</sup>

Thus, the prohibition against government-sponsored racial discrimination is firmly grounded in all of the traditional sources of customary international law set out by Mr. Justice Gray in The Paquete Habana, 175 U.S. 677, 700 (1900). That norm, stated in comprehensive and unqualified language, has never been limited in any authoritative way to demand some incontrovertible showing of individualized intent. Similarly, apparently unlike the Eighth and Fourteenth Amendments as read by the Eleventh Circuit, it admits no defense of degree. Although international law, like domestic law, will not redress trifles, racial discrimination of the type admittedly and repeatedly demonstrated in this case plainly falls within the customary international prohibition.

## III. THE ELEVENTH CIRCUIT WAS REQUIRED TO CONSTRUE THE GEORGIA DEATH PENALTY STATUTE CONSISTENTLY WITH PERTINENT INTERNATIONAL LAW AND FAILED TO DO SO.

It is axiomatic that international law is part of the law of the United States and that, under the Supremacy Clause of the U.S. Constitution<sup>16</sup> as interpreted, it "must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination." The Paquete Habana, 175 U.S. 677, 700 (1900). This basic principle

<sup>&</sup>lt;sup>15</sup> The ALI adopted the revised Restatement of Foreign Relations Law at its meeting in Washington, D.C., on May 14-15, 1986.

<sup>16</sup> U.S. Const., Art. VI, Sec. 2.

has been accepted by this Court from the earliest days of the Republic, Chisolm v. Georgia, 2 Da. 419, 474 (1793) ("Prior ... to that period [the date of the Constitution], the United States had, by taking a place among the nations of the earth, become amenable to the law of nations"); Ware v. Hylton, 3 U.S. (3 Da.) 199, 281 (1796); The Nereide, 13 U.S. (9 Cranch) 388, 423 (1815). It has received fresh confirmation as recently as 1983 in Justice O'Connor's opinion for the Court in First National City Bank v. Banco Para el Commercio Exterior de Cuba, 103 S.Ct. 2591, 2598 (1983). The executive branch has reached the same conclusion. See e.g., Op. Atty. Gen. 27 (1972): "The law of nations, although not specially adopted by the Constitution or any municipal act, is essentially part of the law of the land."17

The "law of nations" which the courts are directed to apply includes treaties to which the U.S. is a party, as well as customary international law or "international common law," which arises out of the practice of states acting in a particular manner because they feel themselves legally bound to do so. This state practice may be deduced from treaties, national constitutions, declarations and resolutions of intergovernmental bodies, public pronouncements by heads of state, and empirical evidence of the extent to which

of the Foreign Relations Law of the United States, § 131, Comment D ("The proposition that international law and agreements are law in the United States is addressed mainly to the courts. They are to apply international law or agreements as if their provisions were enacted by Congress."); Henkin, International Law as Law in the United States, 82 MICH. L. REV. 1555, 1560 (1984).

customary law rules are observed. See North Sea Continental Shelf Cases, [1969] I.C.J. Rep. 37. Unlike treaties which specify obligations only for their signatories, customary international is binding on all nations by virtue of membership in the international community. Consent is unnecessary, and ad hoc objection is unavailing.

As a matter of United States law, customary international law also creates enforceable rights and obligations for individuals. Thus, in The Paquete Habana, supra, this Court held that the customary international law of prize in time of war created rights in an individual whose boat had been seized in violation of those norms. See also Respublica v. De-Longchamps, 1 U.S. 119, 1 Dall. 111 (O. & T. Pa. 1784); Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980); Fernandez v. Wilkinson, 505 F. Supp. 787 (D. Kan. 1980), aff'd on other grounds sub nom., Rodriquez-Fernandez v. Wilkinson, 654 F.2d 1382 (10th Cir. 1981). As The Paquete Habana teaches, when jurisdiction is clear, customary rights by their nature are enforceable by individuals in U.S. courts. 18 Any other disposition would erect the anomoly of a right without a remedy. Thus, in construing the Georgia death penalty statute and Petitioner's sentence thereunder, the Eleventh Circuit Court of Appeals was obliged to "ascertain[] and administer[]" international law, insofar as "questions of right" depend upon it. 175 U.S. at 700.

<sup>&</sup>lt;sup>18</sup> The self-execution doctrine, generally critical in treaty analyses, is irrelevant—indeed meaningless—in the context of customary international law, the intent of whose draftsmen necessarily defies discovery.

The argument here is not that international law in any sense displaces domestic law. It is rather that statutes enacted by Congress or the state legislatures "ought never to be construed to violate the law of nations, if any other possible construction remains." Weinberger v. Rossi, 456 U.S. 25, 33 (1982), quoting Murray v. The Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804). See also, Talbot v. Seeman, 5 U.S. (1 Cranch) 1, 43 (1801); Cook v. United States, 288 U.S. 102 (1983); Lauritzen v. Larsen, 345 U.S. 571, 578 (1953); McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10, 21 (1963). Thus, for example, the State of Georgia could not by statute suspend the customary laws of war or diplomatic immunity within its territory. So too is its implementation of racial discrimination in the imposition of capital punishment a forbidden departure from binding customary international norms.

At a minimum, this Court should reverse the decision below on the ground that the Eighth Amendment to the Constitution, as interpreted in light of international norms, prohibits death sentences tainted by racial discrimination. See Rodriguez-Fernandez, supra, 654 F.2d at 1388. In Trop v. Dulles, 356 U.S. 86, 101 (1958), this Court emphasized that the Eighth Amendment "must derive its meaning from evolving standards of decency that mark the progress of a maturing society." In determining the content of these "evolving standards." the Court noted that the vast majority of nations did not employ denaturalization as a punishment for desertion and concluded that such punishment would be "cruel and unusual" within the meaning of the Eighth Amendment. 356 U.S. at 102-103. Similarly, in Coker v. Georgia, 433 U.S. 584 (1977), this Court held that the imposition of the death penalty for the rape of an adult woman was "cruel and unusual," referring explicitly to international standards. 433 U.S. at 596, n. 10. The Court recently turned again to the "climate of international opinion" in determining that the death sentence was cruel and unusual when imposed on a defendant who had not intended to kill his victim. Enmund v. Florida, 458 U.S. 782, 796 n. 22 (1982).

Plainly then, customary international standards are entitled to persuasive weight under the decisions of this Court. As demonstrated above, there is no customary norm more powerful or well-established than the prohibition of government-sponsored racial discrimination. Under *Trop*, *Coker*, and *Enmund*, therefore, petitioner's Eighth Amendment claim should have been assessed in this light.

Obviously, the en banc court below made no attempt to discharge its burden under either The Paquete Habana to apply international law or Trop and its progeny to consult international standards in determining the "evolving standards of decency" protected by the Eighth Amendment. The en banc court did not address the relevant norms of international law as incorporated into federal common law, nor did it address whether the racial disparities alleged by Petitioner fall within the scope of the international prohibition. Instead, on the issue of discrimination, the en banc court of appeals contented itself with considering only the contours of domestic law. The court's apparent neglect of the peremptory norm of international law prohibiting racial discrimination cannot be squared with this Court's consistent adherence to the law of nations as providing the rule of decision, whenever a

litigant's rights may be framed in its terms. In short, the *en banc* court's failure to assess international law issues raised by its acceptance that the showing of discrimination was valid constitutes error which should be reversed by this Court.

#### CONCLUSION

"Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face." Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 266 (1977). This is such a case. Data collected by Petitioner and by Amicus in parallel international proceedings demonstrate that unequal sanctions are attached to the taking of white and black lives in the State of Georgia. Although the structure and precise results of these studies may vary, the conclusion does not. That the court below was willing to concede the discriminatory impact makes its affirmation of Petitioner's sentence all the more erroneous. In addition, the en banc court's failure to consider the international law issues relevant to this case violates the Supremacy Clause of the Constitution as interpreted, and ignores the decisions of this Court which establish the fundamental role of international law in the law of the United States and its persuasive role in interpreting the Eighth Amendment.

For all of these reasons, Amicus respectfully urges this Court to reverse the decision of the court of appeals below.

Respectfully submitted,

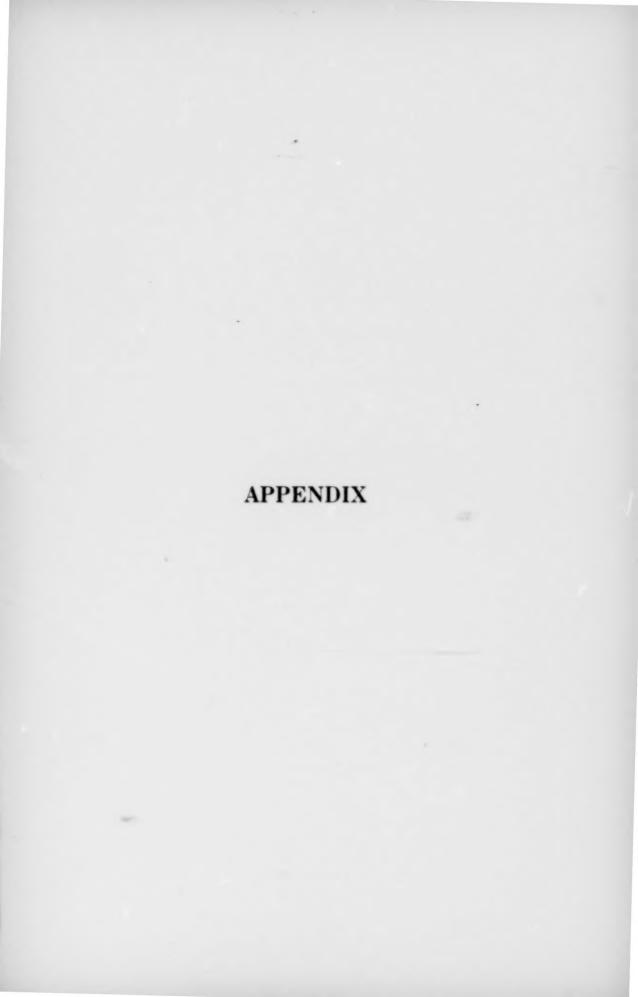
### Of Counsel:

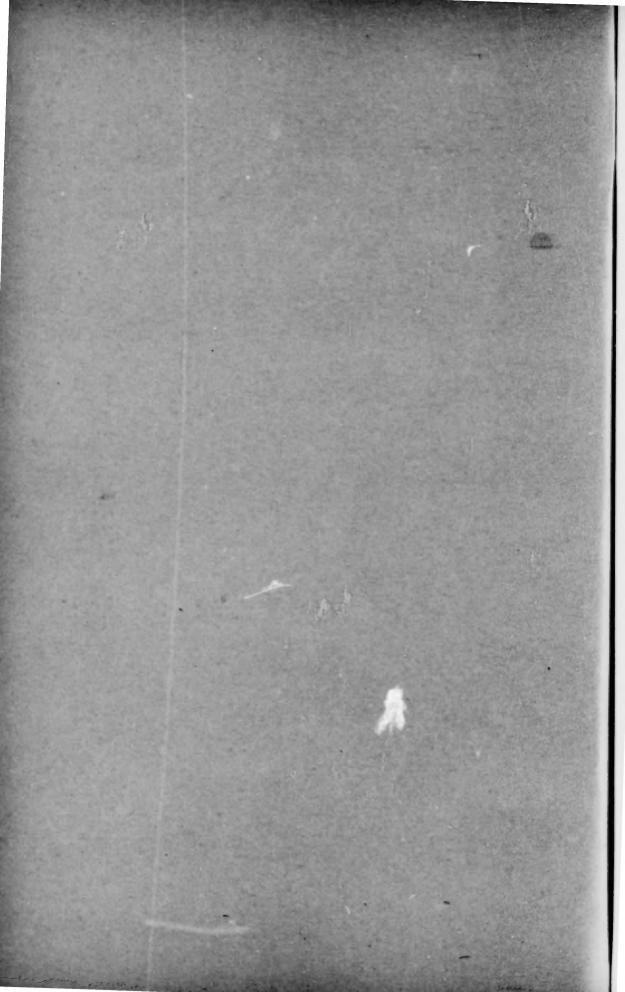
STEVEN M. SCHNEEBAUM PATTON, BOGGS & BLOW 2550 M Street, N.W. Washington, D.C. 20037 \* RALPH G. STEINHARDT 720 20th Street, N.W. Washington, D.C. 20052 (202) 676-5739

8.

\* Counsel of Record

LARRY GARBER
INTERNATIONAL HUMAN RIGHTS
LAW GROUP
722 Fifteenth Street, N.W.
Suite 1000
Washington, D.C. 20005





#### APPENDIX

#### AFFIDAVIT OF PROFESSOR WILLIAM BOWERS

I am a sociologist with particular training in statistics and computer applications to sociology. I graduated from Washington and Lee University in 1957 and received my doctorate in sociology in 1966 from Columbia University. I am presently a professor of sociology at Northeastern University, Boston, Massachusetts, and Director of that University's Center for Applied Social Research.

Since approximately 1972, I have been engaged in research, study, and writing on the use of the death penalty in the United States. I am the author of numerous articles on the subject and of the book *Executions in America*, published in 1974.

Together with the Assistant Director here at the Center, Glenn L. Pierce, and others, I have supplied the figures and statistics on race-victim death sentencing disparaties contained in appendices A and B of this complaint. These figures are accurate to the best of our abilities and reflect sustained research and the use of widely-accepted statistical methods.

I believe, on the basis of my research and analysis, that the broad pattern of race-victim death sentencing disparities complained of in the foregoing document remain unremedied by state or federal authorities and therefore continue today.

#### (signed) William Bowers

Professor William Bowers

SS: Commonwealth of Massachusetts County of Suffolk

Subscribed and sworn to before me this 11th day of April, 1980.

(signed) Philip C. Boyd

Notary Public

My Commission Expires: Nov. 28, 1980

SEAL

#### **FLORIDA**

PROBABILITY OF RECEIVING THE DEATH
SENTENCE FOR CRIMINAL HOMICIDE BY RACE
OF OFFENDER AND VICTIM IN FLORIDA FROM
THE EFFECTIVE DATE OF THE POST-FURMAN
STATUTE THROUGH 1977

	Estimated Number of	Persons Sentenced	Probability of a Death
Race of Offender	$Offenders^a$	to Death	Sentence
White	2265	72	.032
Black	2606	61	.023
Race of Victim			
White	2439	122	.050
Black	2432	11	.005
Offender/Victim			
Racial Combinations	3		
Black Kills White	286	48	.168
White Kills White	2146	72	.034
Black Kills Black	2320	11	.005
White Kills Black	111	0	.000
All Offenders	4871	133	.027

Data Sources: (1) Supplementary Homicide Reports on criminal homicide data from January 1973 through December 1976, supplied by the Uniform Crime Reporting Program, Federal Bureau of Investigation, United States Department of Justice, Washington, D.C.; (2) Supplementary Homicide Reports on criminal homicide data for 1977, supplied by the Uniform Crime Reports Program, Department of Law Enforcement, Tallahassee, Florida; (3) persons sentenced to death from January 1973 through December 1977, supplied by Citizens Against the Death Penalty, Jacksonville, Florida.

"The estimated number of offenders for a given category is obtained by multiplying the reported number of offenders in that category for the years 1976, 1977 (sources: 1, 2) by victim-based adjustment factor to correct for undercoverage. The adjustment factor 3.484 equals the number of homicide victims from January 1973 through December 1977 (sources: 1, 2) divided by the number of homicide victims in the years 1976, 1977 (sources: 1, 2).

#### **GEORGIA**

# PROBABILITY OF RECEIVING THE DEATH SENTENCE FOR CRIMINAL HOMICIDE BY RACE OF OFFENDER AND VICTIM IN GEORGIA FROM THE EFFECTIVE DATE OF THE POST-FURMAN STATUTE THROUGH 1977

Race of Offender	Estimated Number of Offenders <sup>a</sup>	Persons Sentenced to Death	Probability of a Death Sentence
White	1082	41	.038
Black	2716	49	.018
Race of Victim			
White	1265	76	.060
Black	2529	14	.005
Of fender/Victim			
Racial Combinations			
Black Kills White	258	37	.143
White Kills White	1006	39	.039
Black Kills Black	2458	12	.005
White Kills Black	71	2	.028
All Offenders	3798	90	.024

Data Sources: (1) Supplementary Homicide Reports on criminal homicide data from April 1973 through December 1976, supplied by the Uniform Crime Reporting Program, Federal Bureau of Investigation, United States Department of Justice, Washington, D.C.; (2) Supplementary Homicide Reports on criminal homicide data for 1977, supplied by the Criminal Activity Reporting Unit, Georgia Bureau of Investigation, Georgia Crime Information Center, Atlanta, Georgia; (3) Vital Statistics tabulations on willful homicides from April 1973 through December 1977, supplied by the Office of Health Services Research and Statistics, Division of Physical Health, Atlanta, Georgia; (4) Persons sentenced to death from April 1975 through December 1977, supplied by Georgia Committee Against the Death Penalty, Atlanta, Georgia.

<sup>a</sup>The estimated number of offenders for a given category is obtained by multiplying the reported number of offenders in that category for the years 1976, 1977 (sources: 1, 2) by a victim-based adjustment factor to correct for undercoverage. The adjustment factor 4.453 equals the number of homicide victims from April 1973 through December 1977 (source: 3) divided by the number of homicide victims in the years 1976, 1977 (sources: 1, 2).

#### TEXAS

# PROBABILITY OF RECEIVING THE DEATH SENTENCE FOR CRIMINAL HOMICIDE BY RACE OF OFFENDER AND VICTIM IN TEXAS FROM THE EFFECTIVE DATE OF THE POST-FURMAN STATUTE THROUGH 1977

Race of Offender	Estimated Number of Offenders <sup>a</sup>	Persons Sentenced to Death	Probability of a Death Sentence
White	3771	38	.010
Black	2940	29	.010
Race of Victim			
White	3964	71	.018
Black	2740	2	.001
Offender/Victim			
Racial Combinations			
Black Kills White	344	27	.078
White Kills White	3616	37	.010
Black Kills Black	2597	2	.007
White Kills Black	143	0	.000
All Offenders	6711	73	.011

Data Sources: (1) Supplementary Homicide Reports on criminal homicide data from January 1974 through December 1976, supplied by the Uniform Crime Reporting Program, Federal Bureau of Investigation, United States Department of Justice, Washington, D.C.; (2) Supplementary Homicide Reports on criminal homicide data for 1977, supplied by the Uniform Crime Reporting Bureau, Texas Department of Public Safety, Austin, Texas; (3) Vital Statistics records on willful homicides from January 1974 through December 1977, supplied by the Bureau of Vital Statistics, Texas Department of Health, Austin, Texas; (4) persons sentenced to death from January 1974 through December 1977, supplied by the Office of Court Administration, The Supreme Court of Texas, Austin, Texas.

\*The estimated number of offenders for a given category is obtained by multiplying the reported number of offenders in that category for the years 1976, 1977 (sources: 1, 2) by a victim-based adjustment factor to correct for undercoverage. The adjustment factor 2.473 equals the number of homicide victims from January 1974 through December 1977 (source: 3) divided by the number of homicide victims in the years 1976, 1977 (sources: 1, 2).

#### FLORIDA

# PROBABILITY OF RECEIVING THE DEATH SENTENCE FOR FELONY TYPE MURDER BY RACE OF OFFENDER AND VICTIM IN FLORIDA FROM THE EFFECTIVE DATE OF THE POST-FURMAN STATUTE THROUGH 1977

	Estimated	Persons	Probability
	Number of	Sentenced	of a Death
Race of Offender	$Offenders^a$	to Death	Sentence
White	307	54	.176
Black	251	50	.199
Race of Victim			
White	432	97	.224
Black	122	7	.057
Offender/Victim			
Racial Combinations			
Black Kills White	136	41	.301
White Kills White	296	54	.182
Black Kills Black	115	7	.061
White Kills Black	7	0	.000
All Offenders	558	104	.186

Data Sources: (1) Supplementary Homicide Reports on criminal homicide data from January 1973 through December 1976, supplied by the Uniform Crime Reporting Program, Federal Bureau of Investigation, United States Department of Justice, Washington, D.C.; (2) Supplementary Homicide Reports on criminal homicide data for 1977, supplied by the Uniform Crime Reports Program, Department of Law Enforcement, Tallahassee, Florida; (3) persons sentenced to death from January 1973 through December 1977, supplied by Citizens Against the Death Penalty, Jacksonville, Florida.

"The estimated number of offenders for a given category is obtained by multiplying the reported number of offenders in that category for the years 1976, 1977 (sources: 1, 2) by victim-based adjustment factor to correct for undercoverage. The adjustment factor 3.484 equals the number of homicide victims from January 1973 through December 1977 (sources: 1, 2) divided by the number of homicide victims in the years 1976, 1977 (sources: 1, 2).

#### **GEORGIA**

## PROBABILITY OF RECEIVING THE DEATH SENTENCE FOR FELONY-TYPE MURDER BY RACE OF OFFENDER AND VICTIM IN GEORGIA FROM THE EFFECTIVE DATE OF THE POST-FURMAN STATUTE THROUGH 1977

Race of Offender White	Estimated Number of Offenders <sup>a</sup> 196	Persons Sentenced to Death 37	Probability of a Death Sentence .189
Black	338	42	.124
Race of Victim			
White	316	69	.218
Black	218	10	.046
Offender/Victim			
Racial Combinations	3		
Black Kills White	134	34	.254
White Kills White	183	35	.191
Black Kills Black	205	8	.039
White Kills Black	13	2	.154
All Offenders	534	79	.148

Data Sources: (1) Supplementary Homicide Reports on criminal homicide data from April 1973 through December 1976, supplied by the Uniform Crime Reporting Program, Federal Bureau of Investigation, United States Department of Justice, Washington, D.C.; (2) Supplementary Homicide Reports on criminal homicide data for 1977, supplied by the Criminal Activity Reporting Unit, Georgia Bureau of Investigation, Georgia Crime Information Center, Atlanta, Georgia; (3) Vital Statistics tabulations on willful homicides from April 1973 through December 1977, supplied by the Office of Health Services Research and Statistics, Division of Physical Health, Atlanta, Georgia; (4) Persons sentenced to death from April 1973 through December 1977, supplied by Georgia Committee Against the Death Penalty, Atlanta, Georgia; (4) Persons sentenced to death from April 1973 through December 1977, supplied by Georgia Committee Against the Death Penalty, Atlanta, Georgia.

\*The estimated number of offenders for a given category is obtained by multiplying the reported number of offenders in that category for the years 1976, 1977 (sources: 1, 2) by a victim-based adjustment factor to correct for undercoverage. The adjustment factor 4.453 equals the number of homicide victims from April 1973 through December 1977 (source: 3) divided by the number of homicide victims in the years 1976, 1977 (sources: 1, 2).

TEXAS

# PROBABILITY OF RECEIVING THE DEATH SENTENCE FOR FELONY-TYPE MURDER BY RACE OF OFFENDER AND VICTIM IN TEXAS FROM THE EFFECTIVE DATE OF THE POST-FURMAN STATUTE THROUGH 1977

	Estimated Number of	Persons Sentenced	Probability of a Death
Race of Offender	Offenders <sup>c</sup>	to Death	Sentence
White	411	34	.083
Black	294	27	.092
Race of Victim			
White	551	63	.114
Black	151	2	.013
Offender/Victim			
Racial Combinations	1		
Black Kills White	173	25	.144
White Kills White	378	34	.090
Black Kills Black	121	2	.016
White Kills Black	30	0	.000
All Offenders	705	61	.087

Data Sources: (1) Supplementary Homicide Reports on criminal homicide data from January 1974 through December 1976, supplied by the Uniform Crime Reporting Program, Federal Bureau of Investigation, United States Department of Justice, Washington, D.C.; (2) Supplementary Homicide Reports on criminal homicide data for 1977, supplied by the Uniform Crime Reporting Bureau, Texas Department of Public Safety, Austin, Texas; (3) Vital Statistics records on willful homicides from January 1974 through December 1977, supplied by the Bureau of Vital Statistics, Texas Department of Health, Austin, Texas; (4) persons sentenced to death from January 1974 through December 1977, supplied by the Office of Court Administration, The Supreme Court of Texas, Austin, Texas.

<sup>a</sup>The estimated number of offenders for a given category is obtained by multiplying the reported number of offenders in that category for the years 1976, 1977 (sources: 1, 2) by a victim-based adjustment factor to correct for undercoverage. The adjustment factor 2.473 equals the number of homicide victims from January 1974 through December 1977 (source: 3) divided by the number of homicide victims in the years 1976, 1977 (sources: 1, 2).

Mes,

### Sepreme Court of the Anited Otates

OR ARGUMENT

October Texas, 1986

WARREN MCCLERKEY.

Petitioner.

V.

RALPH M. KEMP, Superintendent,

Respondent.

ON WAIT OF CERTIONARY TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE
AND BRIEF OF THE CONGRESSIONAL BLACK CAUCUS,
THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER
LAW, AND THE NATIONAL ASSOCIATION FOR THE
ADVANCEMENT OF COLORED PEOPLE, AS AMICI CURIAE

SETH P. WAXMAN
Miller, Cassidy, Larroca & Lewin
2555 M Street, Suite 500
Washington, D.C. 20037
(202) 293-5400
Counsel for the Congressional
Black Caucus

HAROLD R. TYLER, JR. and
JAMES ROBERTSON, Cochairmen
NORMAN REDLICH, Trustee
WILLIAM L. ROBINSON\*
Lawyers' Committee for Civil
Rights Under Law
'.400 I Street N.W., Suite 400
Washington, D.C. 20008
(202) 571-1212

GROVER HANKINS, General Counsel
NAACP Special Contribution Fund
4806 Mount Hope Drive, Room 801
Baltimore, MD 21215
(301) 388-8900

\*Counsel of Record

598

No. 84-6811

### SUPREME COURT OF THE UNITED STATES

October Term, 1986

WARREN MCCLESKEY,

Petitioner,

v.

RALPH M. KEMP, Superintendent, Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE OF THE CONGRESSIONAL BLACK CAUCUS, THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, AND THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE

The Congressional Black Caucus, the Lawyers' Committee for Civil Rights Under Law, and the National Association for the Advancement of Colored People, respectfully

move the Court pursuant to Supreme Court Rule 36.3, for leave to file the attached brief as amici curiae in support of Petitioner. Petitioner has consented to this filing, but Respondent has refused its consent.

The Congressional Black Caucus is composed of all twenty black members of the United States House of Representatives. Its primary function is to implement and preserve the constitutional guarantee of equal justice under the law for all Americans, particularly black Americans.

The Lawyers' Committee for Civil Rights Under Law is a nationwide civil rights organization that was formed in 1963 by leaders of the American Bar, at the request of President Kennedy, to provide legal representation to blacks who were being deprived of their civil rights. Since then, the national office of the Lawyers' Committee and its local offices

have represented the interests of blacks, Hispanics and women in hundreds of cases challenging state and private actions based on race discrimination. Over a thousand members of the private bar, including former Attorneys General, former Presidents of the American Bar Association and other leading lawyers, have assisted it in such efforts.

The National Association for the Advancement of Colored People is a New York nonprofit membership corporation, with some three million members nationwide. Its principal aims and objectives include eradicating caste or race prejudice among the citizens of the United States and promoting genuine equality of rights in the operation of its laws.

Amici have a long-standing interest in insuring that no one is denied equal justice on the basis of race. We believed it well-established that the unequal

application of criminal statutes on the basis of race is a violation of the Constitution. Yet in this case the Court of Appeals has held that a proven racial disparity in death sentencing does not in and of itself violate the Eighth and Fourteenth Amendments. In order to respond to this ruling we have asked to participate as <a href="mailto:amici.">amici.</a>. In our view, the holding of the Court of Appeals threatens the principle of equality under the law and undermines our efforts to realize this fundamental principle.

Because the issues raised by this case go beyond the interests of Petitioner alone, and the implications of the Court of Appeals' decision affect the rights of all Americans we are dedicated to preserve, we believe our participation will be of assistance to the Court.

For the foregoing reasons, we respectfully request that leave to participate as <u>amici</u> <u>curiae</u> be granted.

Respectfully submitted,

WILLIAM L. ROBINSON\*
HAROLD R. TYLER and
JAMES ROBERTSON, Cochairmen
NORMAN REDLICH, Trustee
Lawyers' Committee for
Civil Rights Under Law
1400 I Street N.W.
Suite 400
Washington, D.C. 20005
(202) 371-1212

Miller, Cassidy, Larroca & Lewin 2555 M Street, Suite 500 Washington, D.C. 20037 (202) 293-6400 Counsel for the Congressional Black Caucus

GROVER HANKINS, General Counsel
NAACP Special Contribution Fund
4805 Mount Hope Drive, Room 501
Baltimore, MD 21215
(301) 358-8900

\*Counsel of Record



### TABLE OF CONTENTS

												P	age
TABL	E OF	AUTHO	RIT	IES	*								ii.
INTE	REST	OF TH	E A	MIC	I							•	1
SUMM	ARY C	F ARG	UME	NT									2
ARGUI	MENT			•	•	•	•	•	•	•	•	•	5
I.	SHOW DRIV IMPO SENT	EVIDE NS THA VING E DSITION TENCES	ORC ON C	E I F C	N AI	TH	IAI	INS					
	OF (	EORGI	A.	•	•	•	•	•	•	•	•	•	5
II.	IN I	NIFICA DEATH- SCIOUS LATE T	SEN	TEN	CI	NO	S I	OE	CIS JS-	SIC	ONS	-	18
	λ.	Any of F in I Into	Raci	al h S	Di er	sonte	enc	m:	ina ng	is	ior		19
	В.	In to Sent Proce	enc of o	ing f A is sh	Ct No a	e cua	Recip	Sicon	ibi Fa	ec ac:	l t	to	23
III.	FAII INFI	AUSE G TH SEN LED TO LUENCE ONSIST	TEN EL OF ENT	CIN IMI RA WI	G NA CE TH	SY TH	IT IT	TEN THE	I I	SHT	гн		
	AND	FOURT	EEN	TH	Aľ	E	IDI	E	TS	•	•	•	36
CONC	LUSIC	on .											44

### TABLE OF AUTHORITIES

	Page
CASES	
Alexander v. Louisiana 405 U.S. 625 (1972) 1	2,28
Amadeo v. Kemp 773 F.2d 1141 (11th Cir. 1985)	30
Arlington Heights v. Metropolitan Housing Corporation 429 U.S. 252 (1977) 2	8,35
Batson v. Kentucky 106 S.Ct. 1712 (1986)	
Bazemore v. Friday 106 S.Ct. 3000 (1986) 12,25,2	7,31
Bowden v. Kemp 793 F.2d 273 (11th Cir. 1986)	30
Briscoe v. LaHue 460 U.S. 325 (1983) 1	5,21
Burrows v. State 640 P.2d 533 (Ok. Crim. 1982)	39
Carter v. Texas 177 U.S. 442 (1900)	21
Casteneda v. Partida 430 U.S. 482 (1977) 11,22,2	8,29
Chicago, Burlington & Quiney Railway v. Babcock 204 U.S. 585 (1907)	25
Coker v. Georgia	41

coley v. State	10741			43
204 S.E.2d 612 (Ga.	19/4)	• •	• •	. 41
Davis v. Zant				
721 F.2d 1478 (11th	Cir.	1984)	•	. 30
Eddings v. Oklahoma				
455 U.S. 104 (1982)			5 •	. 34
Estelle v. Gamble				
429 U.S. 97 (1976)				. 33
Ex Parte Virginia				
100 U.S. 667 (1879)				. 27
Fayerweather v. Rite	ch			
195 U.S. 276 (1904)				. 25
Furman v. Georgia				
408 U.S. 238 (1972)			. 1	passim
Gardner v. Florida				
430 U.S. 349 (1977)				32,34
Gates v. Collier				
501 F.2d 1291 (5th	Cir. 1	974)		. 33
General Building Co				
Ass'n, Inc. v. Penn				
458 U.S. 375 (1982)				. 21
Godfrey v. Georgia				
446 U.S. 420 (1980)				34,39
Gregg v. Georgia				
428 U.S. 153 (1976)		4,5	,36	,37,40
Hall v. State				
244 S.E.2d 833 (Ga.	1978)			. 41
Hazelwood School Di	strict	:		
v. United States				
433 U.S. 299 (1977)				. 31

			v.							•	•		•		•	•	•	•	12
			v. 2d					t	h	Ci	r.		19	8	1)		•		14
Lov 388	vi B	ng U.	s.	. v	ir (1	gi 96	ni (7)	a	•			•			•	•	•	•	20
Mc0 753	21	es F.	key 2d	87	7	Ke (1	mr 1t	h	C	ir		1	98	15	)		F	pass	sim
No:	rr	is U.	s.	55	1a	ba (1	ma 95	3	)	•		•	•		•	•	•	•	21
			s.																32
			s.					12	)				10	),	14	, 2	25,	, 29 ,	31
			s.					19	)	•						1	17,	,21,	31
			7. I				11	lt	h	Ci	r.		19	8	6)				30
			ki 2d								.97	72	)						33
			s.						•	•	•	•	•		•	•	•		27
			v. s.					10	)	•	•	•	4	•		•	•		32
Spa 60	a i	n F	v. 2d	P1	9	ur (S	ie	er	Ci	ir.	. 1	19	79	9)					33
Spe 78	er 4	F	er '	45	K€	emp ()	111	th		Cir		1	98	86	5)				30
			y v					Ga		19	78	3)							38

State v. Osborn								
631 P.2d 187 (Id. 19	81)	•	•	•	•	•	•	39
Strauder v. West Vin	ain	ia						
100 U.S. 664 (1879)					•	•	14,	21
Texas Dept. of Commu	nit	У						
Affairs v. Burdine								
450 U.S. 248 (1981)		•			•	•	•	11
Turner v. Fouche								
396 U.S. 346 (1970)		•	•	•	•	•	21,	22
Turner v. Murray								
106 S.Ct. 1683 (1986	5) .			•	•	•	•	27
Ward v. State								
236 S.E.2d 365 (Ga.	197	77)		•				41
Washington v. Davis								
426 U.S. 229 (1976)								29
Whalen v. State 492 A.2d 552 (Del. )	108							30
492 A.24 332 (Del	190.	,,	•	•	•	•	•	39
Whiteley v. Albers								
106 S.Ct. 1078 (1986	6) .		•	•	•	•	25,	33
Whitus v. Georgia								
385 U.S. 545 (1967)							12,	22
Willis v. Zant								
720 F.2d 1212 (11th	Cir	. :	198	3)				30
Yick Wo v. Hopkins								20
118 U.S. 356 (1886)			•	•	•	•	•	20
Zant v. Stephens								
462 U.S. 862 (1983)					3	9,	40,	43

#### RULES AND STATUTES

TO COLO TENDE TENDE
Georgia Code Ann. §27-2534(b)(2) . 39
OTHER AUTHORITIES
Bentele, The Death Penalty in Georgia: Still Arbitrary 62 WASH.U.L.Q. 573 38,41
Bowers and Pierce, Arbitrariness and Discrimination Under the Post-
Furman Capital Statutes 26 CRIME AND DELINQUENCY 563 (1980) 7
Gillers, Deciding Who Dies 129 U.PA.L.REV. 1 (1980) 38
Gross and Mauro, Patterns of Death 37 STAN.L.REV. 27 (1984) 6,7
HIGGENBOTHAM, IN THE MATTER OF COLOR: RACE IN THE AMERICAN LEGAL PROCESS (1978)
Joint Center for Political Studies, Black Elected Officials: A National Roster (1986) 30
Joint Center for Political Studies, Black Judges in the United States (1986) 30
MYRDAL, AN AMERICAN DILEMMA (1944)
NAACP Legal Defense Fund Death Row U.S.A., August 1, 1986 . 5

Stampp, The Peculiar Institution: Slavery in the Antebellum South

(1956)

No. 84-6811

## IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

WARREN MCCLESKEY,

Petitioner,

v.

RALPH M. KEMP, Superintendent,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF AMICI CURIAE
THE CONGRESSIONAL BLACK CAUCUS,
THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS
UNDER LAW, AND THE NATIONAL ASSOCIATION
FOR THE ADVANCEMENT OF COLORED PEOPLE

### INTEREST OF AMICI

The interests of <u>amici</u> in this case are set out in the preceding Motion for Leave to File this Brief.

#### SUMMARY OF ARGUMENT

The exhaustive scientific proof in this case shows that race has retained a powerful influence on capital sentencing decisions in Georgia, since Furman v. Georgia, 408 U.S. 238 (1972). confirms what is evident to even a casual observer: Just as before Furman, "a look at the bare statistics regarding executions is enough to betray much of the discrimination." 408 U.S. at 364 (concurring opinion of Justice Marshall). The scientific evidence in this case tests every possible explanation for these apparent disparities, and shows nothing can explain them but the conscious or unconscious influence of race. It does so with a thoroughness and rigor which meet or exceed every standard this Court, or any other court, has ever set down for such proof. It cannot be simply explained away or ignored.

The Court of Appeals' suggestion that the discrimination this evidence showed was of a tolerable magnitude is inconsistent with everything this Court has said about race discrimination in criminal justice. It also ignores the true magnitude of the racial disparities here, which matched or exceeded those the Court has found intolerable in related contexts.

The Court of Appeals' insistence on proof of an intentional act of discrimination by an identified actor imposes "a crippling burden of proof," Batson v. Kentucky, 106 S.Ct. 1712, 1720 (1986) on claims of discrimination in this context. There is no justification for imposing such an extraordinary burden here: Death sentencing is quintessential state action; it involves such a range of discretion and such a multitude of decision makers that proof of a particular discriminatory act or animus is unnecessary

and unrealistic. In such circumstances, the kind of strong statistical proof presented here, coupled with a history of discrimination, sufficiently shows "purposeful discrimination" under any established and realistic Fourteenth Amendment standard. Moreover, the separate requirements of the Eighth Amendment place on the states a duty to avoid discrimination in death sentencing which is independent of any particular actor's subjective intent.

The evidence here shows that the hope of Gregg v. Georgia, 428 U.S. 153 (1976) has not been realized. Georgia's uniquely discretionary post-Furman system has not removed discrimination from the imposition of death sentences in that state.

#### ARGUMENT

I. THE EVIDENCE IN THIS CASE SHOWS THAT RACE REMAINS A DRIVING FORCE IN THE IMPOSITION OF CAPITAL SENTENCES IN THE STATE OF GEORGIA.

v. Georgia, 428 U.S. 153 (1976), the State of Georgia has carried out seven executions. Six of the seven men executed were blacks convicted of killing whites; the victim in the seventh case was white, also. If this Court affirms the Court of Appeals' decision in this case, it appears that pattern will persist: Of the fifteen men Georgia holds under death sentences now in force which precede Warren McCleskey's in time, thirteen are black; nine of the

The seven men executed were John Smith (white defendant, white victim); Ivon Stanley (black defendant, white victim); Alpha Stephens (black defendant, white victim); Roosevelt Green (black defendant, white victim); Van Solomon (black defendant, white victim); John Young (black defendant, white victim); John Young (black defendant, white victim); and Jerome Bowden (black defendant, white victim). NAACP Legal Defense Fund, Death Row U.S.A., August 1, 1986 at 4.

thirteen had a white victim; so did both of the two white defendants in this group. 2

These figures are particularly striking when one considers that black people constitute a substantial majority of the victims of all homicides in the state of Georgia, and black-on-white homicides are extremely rare. Although these raw figures are certainly not scientific proof, no fair-minded observer who is aware of the history of race relations in this state can confront them without suspecting that racial inequities persist in the manner in which capital defendants are chosen for execution by the Georgia judicial system.

See Appendix I.

Professor Baldus' data showed black people were the victims in 60.7% (1502/2475) of Georgia homicides; and crimes involving black defendants and white victims constituted only 9.2% (228/2475) of Georgia homicides, during the period he studied. See D.Ct. Exhibit DB 63. FBI Uniform Crime Reports confirm these percentages. See Gross and Mauro, Patterns of Death, 37 STAN.L.REV. 27, 56 (1984).

The evidence presented in this case is strict scientific proof; and it tragically, but unmistakably, confirms that suspicion. From Professor Baldus' most preliminary measures (which showed white victim cases nearly 11 times more likely to receive death sentences than black victim cases, D.Ct. Exhibit DB 62), to his comprehensive and refined (which showed race of victim to multiply the odds of death some 4.3 times, D.Ct. Exhibit DB 82), the evidence presented here shows the influence of race in the Georgia system persists, however it is examined. All other observers have reached the same conclusions, whatever methods and data they have used. 4

<sup>4 &</sup>lt;u>See</u> Gross & Mauro, <u>supra</u>, n.2; Bowers and Pierce, <u>Arbitrariness and</u> <u>Discrimination Under the Post-Furman</u> <u>Capital Statutes</u>, 26 CRIME AND DELINQUENCY 563 (1980).

These persistent findings admit only three conceivable explanations: Either (1) some or all of the actors in the Georgia criminal justice system empowered to make decisions affecting the imposition of the death penalty are intentionally discriminating by race; or (2) the discretionary aspects of the Georgia death sentencing system allow subconscious racial biases to influence the outcome of death sentencing decisions; or (3) some unknown nondiscriminatory influence is at work, and accounts for these persistent disparities in a way no one has yet fathomed.

No one would deny the first of these possibilities violates the Constitution. As we will discuss in Part II below, in the context of the Georgia capital sentencing system, the second does as well. We must first pause, however, to consider the third possible explanation, which the Court of Appeals' majority seized upon when it

faulted the Petitioner's proof for supposedly "ignor[ing] quantitative differences in cases: looks, age, personality, education, profession, job, clothes, demeanor, and remorse, just to name a few...." McCleskey v. Kemp, 753
F.2d 877 (11th Cir. 1985). With all respect, this remarkable assertion is wrong as a matter of fact, as a matter of law, and as a matter of common sense.

The factual error in the Court of Appeals statement is both striking and revealing. Striking is the fact that several of the precise variables the Court of Appeals pointed to were taken into account by Professor Baldus' data. 5
Revealing is the list of new variables the

<sup>5</sup> Professor Baldus' questionnaire (D.Ct. Exhibit DB 38), accounted for the defendant's age (Foil 46), education (Foil 4.13) profession and employment status (Foils 61-69), and expressions of remorse (Foils 183, 274). Professor Baldus recorded similar factors regarding the victim as well. See Foils 111, 112-120.

Court of Appeals conjured up: "looks ... personality ... clothes ... and demeanor." Not only is it unimaginable that such criteria could serve as legitimate justifications for a death sentence; they would be obvious proxies for race prejudice if they were in fact used. 6 For as Judge Clark in his dissenting opinion below noted, "it is these differences that often are used to mask, either intentionally or unintentionally, racial prejudice." McCleskey v. Kemp, supra, 753 F.2d at 925 n.24. The Court of Appeals' resort to these farfetched hypotheticals illustrates how comprehensive Professor Baldus' data are: No one has yet suggested any factors he did not take into account which could

<sup>6</sup> Even the variables that the Court of Appeals identified and Professor Baldus did take into account--job, profession, and education--are not wholly race neutral. Any disadvantages black defendants may suffer in these respects are likely to be the result of past discrimination. Cf. Rogers v. Lodge, 458 U.S. 613, 625-6 (1982).

plausibly and fairly explain death sentencing outcomes.

As a matter of law, the Court of Appeals' error lies in its holding that even such thoroughness was not enough, demanding that statistical proof of discrimination eliminate such nebulous and speculative influences. The breadth of the Baldus studies -- which accounted for over 230 nonracial variables--far exceeds any other ever offered to meet a prima facie standard of proof announced by this Court. 7 And as the Court has recently reiterated, one cannot dismiss or rebut a sophisticated regression analysis -- or any prima facie proof of discrimination, for that matter--"declar[ing] simply that many factors go into making [the relevant decision]", without any "attempt ... to demonstrate

<sup>7</sup> Compare Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); Hazelwood School District v. United States, 433 U.S. 299 (1977); Casteneda v. Partida, 430 U.S. 482 (1977).

that when these factors were properly organized and accounted for there was no significant disparity between ... blacks and whites." Bazemore v. Friday, 106 S.Ct. 3000, 3010-11 n.14 (1986).8 Yet the Eleventh Circuit majority did just that.

The Court of Appeals' strain to find unexplained variables defies common sense because it ignores the social context and history in which the substantial racial discrepancies identified by Professor Baldus were found. The differing treatment of murder defendants in Georgia, based on their race and the race of their victim, is no newly-discovered phenomenon. In Georgia's earliest history, established law provided as follows:

<sup>8</sup> Accord Alexander v. Louisiana, 405 U.S. 625, 631-32 (1972); Whitus v. Georgia, 385 U.S. 545 (1967); Jones v. Georgia, 389 U.S. 24 (1967).

Any slave who killed a white person in order to defend himself, his family, a fellow slave, or a white third party had to be executed. The courts or government could grant no mercy in such cases.

\* \* \*

Death cculd likewise be imposed if a slave "grievously wound[ed], maim[ed], or bruise[d] any white person"; was convicted for the third time of striking a white person; or, ... if he attempted to run away from his master out of the province.

Yet conversely, when a white person killed a slave:

Only on the second offense of willful murder did the 'offender Suffer for the said Crime according to the Laws of England except that he shall forfeit no more of his Lands and Tenemants Goods and Chattels than what may be Sufficient to Satisfy the owner of such Slave so killed as aforesaid....' Conviction for willful murder of a slave also required after 1755 the "oath of two witnesses" an extremely difficult burden of evidence for most criminal prosecutions.

HIGGENBOTHAM, IN THE MATTER OF COLOR: RACE
IN THE AMERICAN LEGAL PROCESS 256, 253-4

(1978).9

This legal system--with its differential treatment of blacks as defendants and victims--was explicitly among the "discriminations which are steps toward reducing [blacks] ... to the condition of a subject race," that the Fourteenth Amendment was enacted to abolish. Strauder v. West Virginia, 100

The problems of Blacks in Burke County [Georgia] should not be viewed in a The present treatment of Blacks in the South is directly traceable to their historical positions as slaves. While individual political leaders While many attempted to bring meaningful reforms to fruition, it is equally true that the White communities, for the most part, have fought the implementation of programs aimed at integration with every device available. A ... court ordering relief in a case such as this must take cognizance of that fact.

<sup>9 &</sup>lt;u>See also Stampp, The Peculiar Institution: Slavery in the Antebellum South</u> 210 (1956).

This history, though ancient, remains relevant. As Judge Fay wrote in Lodge v. Buxton, 639 F.2d 1358, 1381 n.46 (11th Cir. 1981), aff'd sub nom Rogers v. Lodge, 458 U.S. 613 (1982):

U.S. 664, 665 (1879). 10 Yet as this Court has too often had occasion to recognize, for a hundred years that noble effort utterly failed to overcome the entrenched social conditions that the antebellum laws reflected and reinforced. Thus, in 1944--well within the lifetimes of most of the participants in Georgia's legal system today--Gunnar Myrdal observed:

In criminal cases discrimination does not always run against a Negro defendant... As long as only Negroes are concerned and no whites are disturbed, great leniency will be shown in most cases. ... The sentences for even major crimes are ordinarily reduced when the victim is another Negro. ...

\* \* \*

The express intention of the framers of the Fourteenth Amendment to provide for the "equal protection" of blacks as victims of crimes, as well as criminal defendants, has been noted by this Court, Briscoe v. LaHue, 460 U.S. 325, 338 (1983), and recounted briefly in the Petition for Certiorari in this case (at pages 5-7). Because it has nowhere been questioned below, we will not reiterate it here.

For offenses which involve any actual or potential danger to whites, however, Negroes are punished more severely than whites....

The jury, for the most part, is more guilty of obvious partiality than the judge and the public prosecutor. When the offender is a white man and the victim a Negro, a grand jury will often refuse to indict. Even the federal courts find difficulty in getting indictments in peonage suits, and state courts receive indictments for physical violence against Negroes in infinitesimally small proportion of the cases. ... The petit jury is even less impartial than the grand jury, since its range of powers is greater.

There is even less possibility for a fair trial when the Negro's crime is serious. ... On the other hand, it is quite common for a white criminal to be set free if his crime was against a Negro. Southern whites have told the present author of singular occasions when a Negro got justice against a white man, even in a serious case, as something remarkable and noteworthy.

MYRDAL, AN AMERICAN DILEMMA, 551-553 (1944).

Such deeply-rooted biases die hard. The lesson of Professor Baldus' data is that although the influence of these social forces may have diminished and are no longer openly acknowledged, they still weigh significantly in the balance that decides life and death in Georgia's judicial system. As the Court noted in Rose v. Mitchell, 443 U.S. 545, 558-9 (1979):

114 years after the close of the War Between the States and nearly 100 years after Strauder, racial and other forms of discrimination still remain a fact of life, in the administration of justice as in our society as a whole. Perhaps today that discrimination takes a form more subtle than before. But it is not less real or pernicious.

To pretend race prejudice has vanished or never existed, to conjure hypothetical explanations for persistent discrepancies that obviously reflect its influence, is to forget the reality that the Fourteenth Amendment was enacted to address, and this Court has long been vigilant to guard against.

II. SIGNIFICANT RACIAL INFLUENCES
IN DEATH-SENTENCING DECISIONS-CONSCIOUS OR UNCONSCIOUS-VIOLATE THE CONSTITUTION.

The Court of Appeals' ruling goes beyond quibbling about hypothetical uncontrolled variables in the Baldus study. Indeed, the court's majority said it accepted, for purposes of its decision, the validity of Professor Baldus' study, and it "assume[d] ... that it proves what it claims to prove." McCleskey v. Kemp, supra, 753 F.2d at 886. Nonetheless, the court held that proof insufficient to raise even a prima facie case under the Eighth or Fourteenth Amendments. It gave two basic reasons for this: the supposedly insignificant magnitude of the racial disparities the evidence showed; and the lack of direct proof of a discriminatory motive. We will briefly address these each in turn.

# A. Any Significant Quantum of Racial Discrimination in Death Sentencing Is Intolerable.

In part, the Court of Appeals seemed to agree McCleskey showed bias--just not enough bias. Absent proof of subjective discrimination by capital jurors or other decisionmakers in the sentencing scheme, it said statistical proof of racial bias

is insufficient to invalidate a capital sentencing system, unless that disparate impact is so great that it compels a conclusion that the system is unprincipled, irrational, arbitrary, and capricious such that purposeful discrimination—i.e., race is intentionally being used as a factor in sentencing—can be presumed to permeate the system.

753 F.2d at 892. And here the court found McCleskey's proof lacking (id. at 895):

The Baldus study statistical evidence does not purport to show that McCleskey was sentenced to death because of either his race or the race of his victim. It only shows that in a group involving blacks and whites, all of whose cases are virtually the same, there would be more blacks receiving the death penalty than whites and more murderers of whites receiving the death

penalty than murderers of blacks.

(Emphasis added.)

That any court in this day and age could simply dismiss admittedly valid, comprehensive proof because it "only" demonstrated that race is an influential factor in capital sentencing is astounding. Amici have long understood that unequal enforcement of criminal statutes based upon racial considerations violates the Fourteenth Amendment. Such racial disparity, whatever its magnitude, has "no legitimate overriding purpose independent of invidious racial discrimination," Loving v. Virginia, 388 U.S. 1, 11 (1967); Yick Wo v. Hopkins, 118 U.S. 356 (1886); cf. Furman v. Georgia, supra, 408 U.S. 238, 389 n.12 (dissenting opinion of Chief Justice Burger). For well over 100 years, this Court has consistently interpreted the Equal Protection Clause to prohibit all racial discrimination in the administration of the criminal justice system. 11

While questions concerning the necessary quantum of proof have occasionally proven perplexing, no federal court until now has ever, to our knowledge, seriously suggested that racial discrimination at any level of magnitude, if clearly proven, can be constitutionally tolerated. Yet that is precisely the holding of the Court of Appeals.

Moreover, even if the magnitude of discrimination were relevant, the evidence here demonstrates an extraordinary racial effect. The regression models the Court of Appeals focused on, for example, showed the increased likelihood of a death sentence, if the homicide victim is white, is .06, or

Virginia, supra; Carter v. Texas, 177 U.S. 442 (1900); Norris v. Alabama, 294 U.S. 559 (1953); Turner v. Fouche, 396 U.S. 346 (1970); Rose v. Mitchell, supra; General Building Contractors Ass'n, Inc. v. Pennsylvania, 458 U.S. 375, 382-91 (1982); Briscoe v. LaHue, supra, 460 U.S. at 337-40.

six percentage points, holding all other factors constant. 753 F.2d at 896-7. Since the average death-sentence rate among Georgia cases is only .05, the fact that a homicide victim is white, rather than black, more than doubles the average likelihood of a death sentence (from .05 to .11).12 In plainest terms, these

<sup>12</sup> It is important to note that these figures, and all those Prof. Baldus used to express the racial disparities he found, are different from the raw numbers used to measure racial disparities in jury challenges. In those cases, the Court has generally compared the raw percentages of minority persons selected for jury service with the population as a whole. See, e.g., Casteneda v. Partida, supra (40% disparity); Turner v. Fouche, 396 U.S. 346 (1970) (23% disparity); Whitus v. Georgia, supra (18% disparity).

Prof. Baldus' tables list smaller numbers, because they express a different ratio: the comparative percentages of persons in different racial categories selected for death sentences. A comparable calculation using the figures in <u>Casteneda</u> (430 U.S. at 486 n.7), for example, would show an arithmetic difference of .26% rather than 40%: The odds of a person in the population as a whole being selected for a grand jury was .54% (870/158690); the odds of a Spanish surnamed person being selected was .28% (339/120766).

percentages suggest that, among every 100 homicide cases in Georgia, 5 would receive a death sentence if race were not a factor; reality, where white victims are in involved, 11 out of 100 do. Six defendants are thus sentenced to death, who would not be but for the race of their victims. "Stated another way, race influences the verdict just as much as any one of the aggravating circumstances listed in Georgia's death penalty statute." 753 F.2d at 921 (Clark, J., dissenting). The Court of Appeals' bland suggestion that race affects at most a "small percentage of the cases," 753 F.2d at 899, scarcely reflects this harsh reality. No analysis true to the Fourteenth Amendment can condone it.

B. In the Context of Sentencing Decisions, Proof of Actual Subjective Intent Is Not Required to Establish a Prima Facie Case of Discrimination.

The question Professor Baldus' data does not and cannot answer is whether the

impact of race on Georgia's death sentencing system is the result of deliberate discrimination or unconscious racial influences on the actors who are part of it. Can it be that resolution of this issue—on which proof may be impossible—is a prerequisite to relief? We believe not. The dispositive issue is whether, not why, race is a significant influence on sentencing decisions.

The Baldus study demonstrates that race is a significant influence. The Court of Appeals holds that this pattern affronts no constitutional principles. That cannot be the law. If race is a significant factor in capital sentencing outcomes, whatever subjective intent lies behind this factor—be it conscious or unconscious—is constitutionally irrelevant.

The significance of the subjective intent in claims of discrimination and cruel and unusual punishment has occupied

this Court's attention several times in recent years. See, e.g., Bazemore v. Friday, supra; Whiteley v. Albers, 106 s.Ct. 1078 (1986); Rogers v. Lodge, supra. In every instance, the Court's answer has reflected a realistic focus on the context in which the challenged governmental action occurs. Here, that focus militates against a holding that proof of an act of intentional discrimination by an identified decision maker should be essential to showing a constitutional violation.

Most fundamentally, requiring proof of subjective intent in the sentencing context raises an impossible burden. Jurors "cannot be called ... to testify to the motives and influences that led to their verdict."

Chicago, Burlington & Quiney Railway v. Babcock, 204 U.S. 585, 593 (1907). Neither is it seemly or proper to so question judges about the motives for their decisions. Fayerweather v. Ritch,

Marshall recently observed, "[a]ny prosecutor can easily assert facially neutral reasons for [his actions] ... and trial courts are ill-equipped to second guess those reasons." Batson v. Kentucky, supra, 106 S.Ct. at 1728 (concurring opinion). Moreover, the influence of race prejudice may well be unconscious, unknown to the decision-makers themselves. Ibid.

"Defendants cannot realistically hope to find direct evidence of discriminatory intent." McCleskey v. Kemp, supra, 753
F.2d at 912 (Johnson, J., dissenting).
Only last Term this Court reiterated that the Equal Protection Clause does not permit shouldering a defendant with "a crippling burden of proof" in order to make out a prima facie case of discrimination. Batson v. Kentucky, supra, 106 S.Ct. at 1720.
There is no reason to except from that here.

The death sentence decisionmaking process is one controlled from stem to stern by the state; everything about capital sentencing is state action. 13 Nowhere does the "voluntary and unfettered choice of private individuals", Bazemore v. Friday, supra, 106 S.Ct. at 3012 (concurring opinion), intervene. At the same time, death sentencing decisions are highly discretionary, see Turner v. Murray, 106 S.Ct. 1683 (1986); and as demonstrate in the following section of this brief, Georgia's statutory capital sentencing scheme does less to guide discretion than any other this Court has reviewed since Furman.

Where official grants of discretion provide "the opportunity to discriminate" and "the result bespeaks discrimination", this Court has found the Constitution is

<sup>13 &</sup>lt;u>Cf. Shelly W. Kramer</u>, 334 U.S. 1, 15 (1948); <u>Ex Pares Virginia</u>, 100 U.S. 667, 669 (1879).

violated "whether or not it was a conscious decision on the part of any individual" to discriminate. Alexander v. Louisiana, 405 U.S. 625, 632 (1972). Even though "[t]he facial constitutionality of the ... system ... has been accepted" by this Court, "a selection procedure that is susceptible of abuse ... supports the presumption of discrimination raised by the statistical showings." Casteneda v. Partida, supra, 430 U.S. at 497, 494.

This is especially true where, as here, the discretionary decision is not an individual one, but the collective one involving a multitude of individuals. When decisionmaking responsibility is diffused,

[r]arely can it be said that a [decisionmaking] ... body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the 'dominant' or 'primary' one.

Arlington Heights v. Metropolitan Housing Corporation, 429 U.S. 252, 265 (1977). In

such systems, for practical purposes, there is no difference between subjective intent and objective results. As Justice Stevens explained in Washington v. Davis, supra:

Normally the actor is presumed to have intended the natural consequences of his deeds. This is particularly true in the case of governmental action which is frequently the product of compromise, of collective decision making, and of mixed motivation.

426 U.S. at 253 (concurring opinion).

sentencing occurs in an arena in which blacks have traditionally lacked the means to defend themselves through participation in the process. Cf. Rogers v. Lodge, supra, 458 U.S. at 650-53 (dissenting opinion of Justice Stevens); Casteneda v. Partida, supra, 430 U.S. at 515-16 (dissenting opinion of Justice Powell). The legacy of past discrimination, if nothing else, has kept blacks from equal participation as prosecutors and judges,

the officials who can influence death penalty decisions in Georgia. 14 And one need not look beyond recent casebooks to find evidence that blacks—at least at the time of Warren McCleskey's trial—often lacked an equal voice on Georgia juries, as well. 15 This—and the history of discrimination in capital sentencing this Court acted on in Furman—highlights the significance of objective disparities:

G

black District Attorneys anywhere in Georgia. Joint Center for Political Studies, Black Elected Officials: A National Roster 113 (1986). Only 2.3% (20/865) of Georgia judges are black. Ibid; Joint Center for Political Studies, Black Judges In The United States 38-40 (1986). At the time of Warren McCleskey's trial there were less than a quarter that number (4)--and not one in a court with jurisdiction over a capital case. Joint Center for Political Studies, Black Elected Officials: A National Roster 53 (1976).

<sup>15</sup> See, e.g., Bowden v. Kemp, 793
F.2d 273 (11th Cir. 1986); Spencer v. Kemp,
784 F.2d 458 (11th Cir. 1986); Ross v.
Kemp, 785 F.2d 1467 (11th Cir. 1986);
Amadeo v. Kemp, 773 F.2d 1141, 1143 (11th
Cir. 1985); Davis v. Zant, 721 F.2d 1478
(11th Cir. 1984); Willis v. Zant, 720 F.2d
1212, 1217-18 (11th Cir. 1983).

Evidence historical of discrimination is relevant inference drawing an purposeful discrimination, particularly in cases such as this one where the evidence shows that discriminatory practices were commonly utilized, but that they were abandoned when enjoined by courts ... and that they were replaced by laws and practices which, though neutral on their served to maintain the status quo.

Rogers v. Lodge, supra, 458 U.S. at 625; see also Bazemore v. Friday, supra, 106 S.Ct. at 3009; Hazelwood School District v. United States, 433 U.S. at 309-10 n.15.

Finally, it is significant that the discrimination here falls in the most central core area to which the Fourteenth Amendment was directed. "Discrimination on the basis of race, odious in all its aspects, is especially pernicious in the administration of justice." Rose v. Mitchell, 443 U.S. 545, 555 (1979). Denial of racial equality in the context of criminal justice "not only violates our Constitution and the laws enacted under it,

but is at war with our basic concepts of a democratic society and a representative government." Smith v. Texas, 311 U.S. 128, 130 (1940). And where the criminal law involves the death sentence,

[i]t is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion.

Gardner v. Florida, 430 U.S. 349, 358 (1977).

The fact the death penalty is involved here, of course, means this is an area in which the Eighth Amendment must play a part in addition to the Fourteenth. Throughout its jurisprudence, the Court has found the touchstone of Eighth Amendment analysis in results, not intentions. See Rhodes v. Chapman, 452 U.S. 337, 364 (1981) (concurring opinion of Justice Brennan);

id. at 345-46 (plurality opinion). 16
"Deliberate indifference" to deprivations of constitutional magnitude has, in all but the rarest circumstances, been held sufficient to make out a claim under the Eighth Amendment. Estelle v. Gamble, 429 U.S. 97, 105 (1976). 17 This Court's death penalty cases have repeatedly charged the states with the responsibility, not just to avoid "indifference", but to positively insure "that general laws are not applied

The lower federal courts have read this Court's decisions to mean that "wrongful intent is not a necessary element for an Eighth Amendment violation." Spain v. Procunier, 600 F.2d 189, 197 (9th Cir. 1979); see Gates v. Collier, 501 F.2d 1291, 1300-01 (5th Cir. 1974); Rozcecki v. Gaughan, 459 F.2d 6, 8 (1st Cir. 1972).

not provide the kind of exceptional circumstance involving a "clash with other equally important governmental responsibilities" or a need to make a review of "decisions necessarily made in haste, under pressure, and frequently without the luxury of a second chance," in which the Court has held "ordinary errors of judgment" must be insulated from hindsight review. Whitely v. Albers, 106 S.Ct. 1078, 1084, 1085 (1986).

sparsely, selectively, and spottedly to unpopular groups." Furman v. Georgia, supra, 408 U.S. at 256 (concurring opinion of Justice Douglas); see also id. at 274 (concurring opinion of Justice Brennan).

"[C]apital punishment [must] be imposed fairly, and with reasonable consistency, or not at all." Eddings v. Oklahoma, 455 U.S. 104, 112 (1982). 18 If nothing else, Furman made it clear that departures from that rule are intolerable, regardless of the motives that created them. See Furman v. Georgia, supra, 408 U.S. at 303 (concurring opinion of Justice White).

Accord, Gardner v. Florida, supra, 430 U.S. at 351 (1977) ("[T]he state must administer its capital sentencing procedures with an even hand."); Godfrey v. Georgia, 446 U.S. 420, 428 (1980) ("If a state wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its laws in a manner that avoids the arbitrary and capricious infliction of the death penalty.")

Everything in this Court's jurisprudence to date suggests that differential treatment by race in death sentencing should be the subject of the strictest judicial scrutiny of any governmental action. If, in this context, overwhelming, comprehensive proof of racial disparities—proof that excludes every plausible, legitimate explanation other than the influence of race bias—is not enough, where can it be?

The answer this Court has given before is that it is enough to prove that a state has failed to break a historical pattern of discrimination, and that discretionary decisions have produced "a clear pattern, unexplainable on grounds other than race."

Arlington Heights v. Metropolitan Housing Corp., supra, 429 U.S. at 266. There is no reason to change that answer now.

III. BECAUSE GEORGIA'S UNIQUE DEATH
SENTENCING SYSTEM HAS FAILED TO
ELIMINATE THE INFLUENCE OF RACE,
IT IS INCONSISTENT WITH THE EIGHTH
AND FOURTEENTH AMENDMENTS.

Gregg v. Georgia expressed this Court's hope that a new Georgia death sentencing system could eradicate the inequities that had led to the invalidation of its predecessor in Furman. Of all the statutory schemes reviewed by this Court in 1972, the Georgia system differed the least from those struck down in Furman. But it was a new statute, and the Court understandably declined to "accept the naked assertion that the effort [to purge the system of discrimination] is bound to fail", 428 U.S. at 222 (concurring opinion). It is now apparent--from experience, not assertion--that it has.

The reason for this must lie in the way the Georgia statute is written or enforced. The enforcement of the law, of course, is the primary responsibility of

district attorneys. In <u>Gregg</u>, the Court refused to assume, without proof, "that prosecutors [will] behave in a standardless fashion in deciding which cases to try as capital felonies...." 428 U.S. at 225 (concurring opinion). The evidence in this case strongly suggests that they have.

Lewis Slayton, the District Attorney whose office tried Warren McCleskey, testified in this case that the decisionmaking process in his office in capital cases was "probably ... the same" before and after Furman. Slayton Dep., at 59-61. Other Georgia prosecutors have candidly admitted that their decisions to seek, or not to seek, death sentences are often based on a variety of "factors other than the strength of their case and the likelihood that a jury would impose the death sentence if it convicts," 428 U.S. at 225--including office resources, subjective opinions about the defendant, public pressure, the standing of the victims, and even the desire "to obtain a more conviction prone jury through the Witherspoon qualification." Bentele, The Death Penalty in Georgia: Still Arbitrary, 62 WASH.U.L.Q. 573, 616-621 (1985). It is therefore hardly surprising that the outcome of these prosecutorial decisions often appears to be unfair (ibid.)--or that Prof. Baldus found them a source of substantial disparities based on race of both the defendant and the victim. See D.Ct. Exhibit DB 95-6.

When capital charges are pursued, the structure of Georgia's law gives juries uniquely broad and unguided discretion. Unlike virtually all other states, Georgia does not provide juries with lists of aggravating and mitigating factors, or any statutory formula for balancing them

against one another. 19 See Spivey v. State, 246 S.F.2d 288 (Ga. 1978). Unlike most states, Georgia does not limit its juries to consideration of statutory aggravating factors, Zant v. Stephens, 462 U.S. 862 (1983); and its broadest statutory factors often do not substantially narrow the class of persons eligible for a sentence of death. 20

penalty laws list mitigating circumstances (except Texas, which is unique); the vast majority also provide guidelines for balancing them against aggravating factors. Gillers, Deciding Who Dies, 129 U. PA. L. REV. 1, 102-119 (1980). Of the four states that do not provide for a listing of mitigating factors by statute, three do by judicial decision. Whalen v. State, 492 A.2d 552, 560-2 (Del. 1985); State v. Osborn, 631 P.2d 187, 197 (Id. 1981); Burrows v. State, 640 P.2d 533 (Ok. Crim. 1982). The exception is South Dakota, which has had no death sentences and no appellate decisions.

See Godfrey v. Georgia, supra. Even apart from the (b)(7) aggravating circumstance addressed in Godfrey, Georgia is one of the few states that still makes conviction of unintentional felony murder—the crime of which William Henry Furman was convicted—a sufficient prerequisite for a death sentence. Ga. Code Ann. §27-2534(b)(2).

This discretion has not been controlled by the provision for special review by the Georgia Supreme Court, the major feature of the Georgia system which impressed this Court in Gregg, and appeared to distinguish Georgia's law from the preFurman statutes. Zant v. Stephens, supra,
462 U.S. at 876. Justice White's concurring opinion in Gregg emphasized the potential importance of this review:

[I]f the Georgia Supreme Court properly performs the task assigned to it under the Georgia statutes, death sentences imposed for discriminatory reasons or wantonly or freakishly for any given category of crime will be set aside. Petitioner has wholly failed to establish, and has not even attempted to establish, that the Georgia Supreme Court failed properly to perform its task in this case or that it is incapable of performing its task adequately in all cases; and this Court should not assume that it did not do so.

428 U.S. at 224. But now, ten years after Gregg, that apparent protection has proven illusory. The Georgia Supreme Court has

never reversed a single death sentence based on a finding of passion, prejudice, or race discrimination. Nor has it reduced a murder sentence as disproportionate to the sentences imposed in other cases for comparable crimes.<sup>21</sup>

In light of the evidence in this case, that means that for thirteen years, the Georgia Supreme Court has presided over a system that demonstrably discriminates on the basis of race and done nothing to correct it. Whether this reflects a

Since 1974--when it partly anticipated Coker v. Georgia, 433 U.S. 584 (1977) by reversing a single rape death sentence as disproportionate, Coley v. State, 204 S.E.2d 612 (Ga. 1974) -- the Georgia court has freed only two men from death judgments without finding legal One of them had received a life sentence in a previous trial. Ward v. State, 236 S.E.2d 365 (Ga. 1977). was a nontriggerman, codefendant received a death sentence. Hall v. State, 244 S.E.2d 833 (Ga. 1978). Although the Georgia court did not so hold -- and three of its Justices dissented each time--both sentences probably were independently invalid under the federal Constitution. See Bentele, supra, 62 WASH. U.L.Q. at 594-5.

"deliberate indifference" to race discrimination or--more likely--a systemic inability to identify it when it occurs, the result is the same: The hope this Court expressed in Gregg has not been realized.

As Chief Justice Burger recognized in his <u>Furman</u> dissent (408 U.S. at 389 n.12):

If a statute that authorizes the discretionary imposition of a particular penalty for a particular crime is used primarily against defendants of a certain race, and if the pattern of use can be fairly explained only by references to the race of the defendant, the Equal Protection Clause of the Fourteenth Amendment forbids continued enforcement of that statute in its existing form. Cf. Yick Wo v. Hopkins, 118 U.S. 356 (1886).

Georgia's post-<u>Furman</u> statute was not shown to fit that description in <u>Gregg</u>; but it has been now. The discriminatory pattern is more complex and involves both the race of the defendant and the race of the victim. But the proof of discrimination is clear and compelling.

This wide-open statutory system has permitted prosecutors and jurors, consciously or unconsciously, to "attach[] the 'aggravating' label to factors that are constitutionally impermissible or totally irrelevant to the sentencing process," Zant v. Stephens, supra, 462 U.S. at 885: the race of the defendant and victim. From Furman to Zant, this Court has said that the Constitution will not allow such discriminatory factors to govern the allocation of death sentences. It should so hold now.

### CONCLUSION

The decision of the Court of Appeals should be reversed.

Respectfully submitted,

WILLIAM L. ROBINSON\*
HAROLD R. TYLER and
JAMES ROBERTSON, Cochairmen
NORMAN REDLICH, Trustee
Lawyers' Committee for
Civil Rights Under Law
1400 I Street N.W.
Suite 400
Washington, D.C. 20005
(202) 371-1212

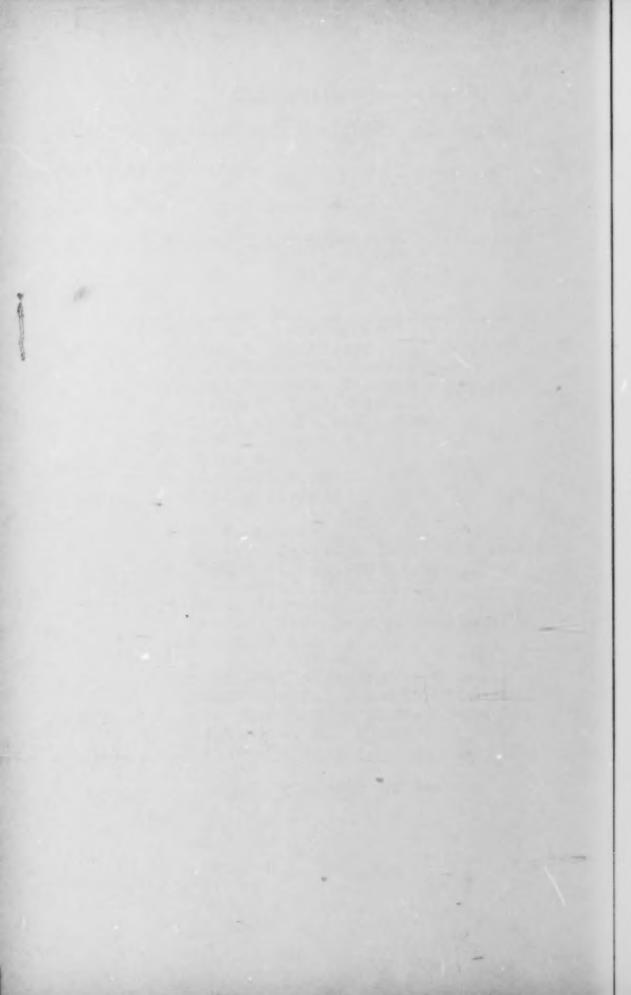
SETH P. WAXMAN
Miller, Cassidy, Larroca & Lewin
2555 M Street, Suite 500
Washington, D.C. 20037
(202) 293-6400
Counsel for the Congressional
Black Caucus

GROVER HANKINS, General Counsel
NAACP Special Contribution Fund
4805 Mount Hope Drive, Room 501
Baltimore, MD 21215
(301) 358-8900

\*Counsel of Record

Lugust 21, 1986





#### APPENDIX I

### Race of Defendant and Victim

Georgia Death Sentences Currently In Force, Preceding Warren McCleskey's In Time. 1

	Race of Defendant	Race of Victim
Willie X Ross	black	white
Timothy McCorquodale	e white	white
Wiley Dobbs	black	white
William Neil Moore	black	black
Marcus Chenault	black	black
William Mitchell	black	white
James Spencer	black	white
David Peek	black	black
Joseph Mulligan	black	black
Carzell Moore	black	white
Johnny Lee Gates	black	white
Son Fleming	black	white
Henry Willis	black	white
Bobb Redd	white	white
Robert Collier	black	white

Source: NAACP Legal Defense
Fund, Death Row U.S.A., August 1, 1986
(race of defendant and status of case); Ms.
Tanya Coke, NAACP Legal Defense Fund (race of victim).

No. 84-6811

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1985

WARREN McCLESKEY,

Petitioner.

\_v.\_

RALPH M. KEMP, Superintendent, Georgia Diagnostic & Classification Center.

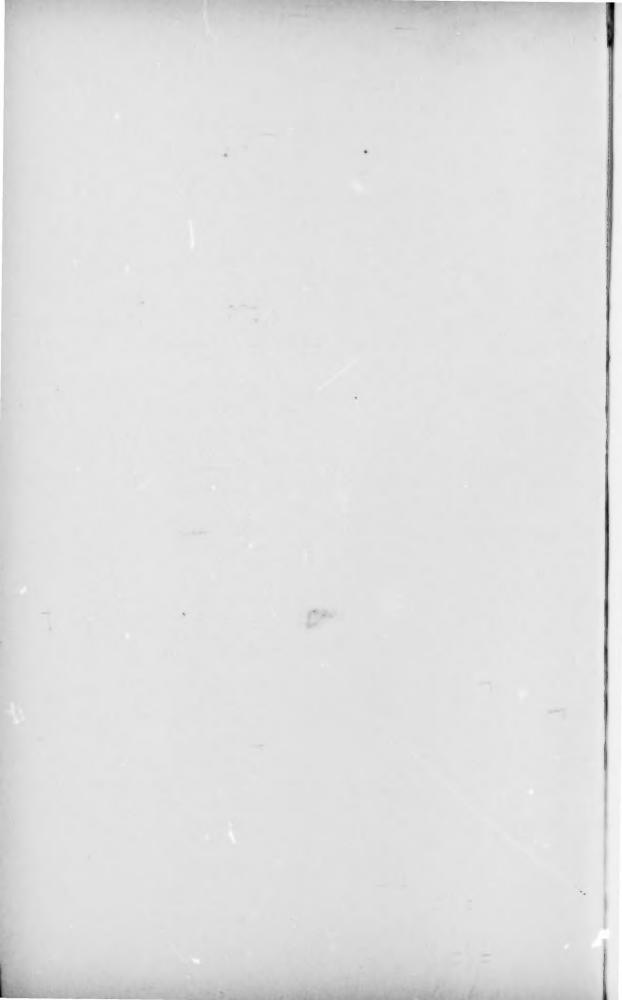
ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE
AND BRIEF AMICI CURIAE FOR DR. FRANKLIN M. FISHER,
DR. RICHARD O. LEMPERT, DR. PETER W. SPERLICH,
DR. MARVIN E. WOLFGANG, PROFESSOR HANS ZEISEL
& PROFESSOR FRANKLIN E. ZIMRING IN SUPPORT
OF PETITIONER WARREN McCLESKEY

MICHAEL O. FINKELSTEIN
MARTIN F. RICHMAN\*
BARRETT SMITH SCHAPIRO
SIMON & ARMSTRONG
26 Broadway
New York, New York 10004
(212) 422-8180

Attorneys for Amici Curiae

\*Counsel of Record



## TABLE OF CONTENTS

TABLE	OF	AUTHO	RIT	TIES		•	•	•	•	•	•		•	a
MOTION	-											_		
. (	CURI	AE .	•		•	•	•	•	•	•	•	•	•	i
BRIEF	AMI	CI CI	RIA	E .							•			1
5	SUMN	MARY C	F	ARGU	ME	TN								1
1	ARGU	MENT	•		•	•	•	•	•	•	•	•		8
	Ι.	THE DEMOSTATE RACE VICTORY CIRC SUBSTITE SENT	ONST TE OF TIM LICUMS TAN RAT	TRATOF GF THE HAS	E SEOS	THI RG: HOI EEI RA' W: IM: CA:	AT IA MI VA' ITI PA	III AN TII H I	N THI DE NG A OI L	E				8
	II.	THE EMP! PRO! PRO! PRO! THE GEO! SEN'	FESSIRIO DUCI IAB ROS	ED ESION CAL ED SLE FLE CA'S	RE TR	EL SE ON DI RA PI	LE ET AR G, NG CE TA	NT HO CH S I	DS A ON N	ND				20
	CON	CILICT	) N											29



## TABLE OF AUTHORITIES

<u>Pages</u>
Ballew v. Georgia, 435 U.S. 223 (1972)iv,vi
Bazemore v. Friday,U.S, L.Ed.2d(1986)14,23,30
Hazelwood School District v. United States, 433 U.S. 299 (1977) 30
McCleskey v. Kemp, 753 F. 2d 877 (11th Cir. 1985) (en banc) v,16
McCleskey v. Zant, 580 F. Supp. 388 (N.D. Ga. 1984)21,27
Segar v. Smith, 738 F. 2d 1249 (D.C. Cir. 1984). 30
Teamsters v. United States, 431 U.S. 324 (1977) 30
Vuyanich v. Republic National Bank, 505 F.Supp.244 (N.D. Tex. 1980), vacated on other grounds, 723 F.2d 1195 (5th Cir. 1984) 30
<u>Statutes</u>
Former Ga. Code Ann. §27-2534.1(6))(2)

# Other Authorities

Fi	sher, Multiple Regression in Legal Proceedings, 80 Colum. L. Rev. 702 (1980)iii
н.	Kalven & H. Zeisel, The American Jury (1966)vi
R.	Lempert, An Invitation to Law and Social Science: Desert, Disputes and Distribution (1986). iv

No. 84-6811

IN THE

# SUPREME COURT OF THE UNITED STATES October Term, 1985

WARREN MCCLESKEY,

Petitioner,

- v.-

RALPH M. KEMP, Superintendent, Georgia Diagnostic & Classification Center.

On Writ of Certiorari To The United States Court of Appeals for the Eleventh Circuit

# MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

Dr. Franklin M. Fisher, Dr. Richard
O. Lempert, Dr. Peter W. Sperlich, Dr.
Marvin E. Wolfgang, Professor Hans Zeisel
and Professor Franklin E. Zimring
respectfully move, pursuant to Rule 36.3 of
the Rules of the Court, for leave to file

the attached brief amici curiae in support of the petitioner in this case. The consent of counsel for petitioner has been obtained. The consent of counsel for respondent was requested but refused, necessitating this motion.

This case involves one of the most carefully studied criminal justice questions to come before the Court. At issue is research by Professor David Baldus and his colleagues on the influence of racial factors in the capital sentencing system of the State of Georgia. The underlying constitutional and policy questions are of great national concern, and the value of social science evidence is a central issue in the case.

Amici believe they could be of aid to the Court in the evaluation of: (i) the significance of the racial disparities reported in the Baldus studies and (ii) the validity of these studies. The competence of <u>amici</u> to address these issues stems from their distinguished professional work in the areas of econometrics, statistics, research methodology and criminal justice issues.

Dr. Franklin M. Fisher is Professor of Economics at the Massachusetts Institute of Technology. He is one of the nation's foremost econometricians, having taught, written and consulted on a wide range of econometric and legal issues for over three decades. His article Multiple Regression in Legal Proceedings, 80 Colum. L. Rev. 702 (1980), has had a major influence on the judicial use of statistical methods. His research on sentencing guidelines and on the legal context of various economic issues has provided major empirical contributions to the fields of law and economics. He has served as a member of the National Academy of Sciences Panels on Deterrence and Incapacitation and on Sentencing Research.

Dr. Richard O. Lempert is Professor of Law and Sociology at the University of Michigan. He has studied and written widely on a variety of legal and criminal justice issues, including capital punishment. He has served on the editorial of several distinguished boards professional journals including the Journal of Law and Human Behavior and Evaluation Review. Dr. Lempert has recently completed a term as the editor of Law & Society Review. His most recent book is An Invitation to Law and Social Science: Desert, Disputes and Distribution (1986). His work on jury size was cited by the Court in Ballew v. Georgia, 435 U.S. 223 (1978).

Dr. Peter W. Sperlich is Professor of Political Science at the University of California at Berkeley. Dr. Sperlich has taught, consulted and published widely on

many criminal justice issues, including the role of juries and the use of scientific evidence in legal settings. His writings were cited prominently by the Court of Appeals in McCleskey v. Kemp.

Dr. Marvin E. Wolfgang is Professor of Criminology and Criminal Law and Director of the Sellin Center for Studies in Criminology and Criminal Law at the University of Pennsylvania. During his distinguished career, Dr. Wolfgang has made numerous contributions to the development of empirical research on legal issues. His pioneering study on the influence of racial factors in the imposition of death sentences for rape was the object of intensive legal examination during the Maxwell v. Bishop litigation of the 1960s. He is a former president of the American Society of Criminology.

Professor Hans Zeisel is Emeritus Professor of Law and Sociology and Associate of the Center for Criminal Justice Studies at the University of Chicago. He is co-author of The American Jury, widely recognized as one of the most influential empirical studies of the legal system ever published. Professor Zeisel is a fellow of the American Statistical Association and the American Academy of Arts and Sciences. His empirical research on the functioning of juries was relied upon by this Court in Ballew v. Georgia, supra.

Professor Franklin E. Zimring is Professor of Law and Director of the Earl Warren Institute at Boalt Hall, University of California at Berkeley. He has written extensively on criminal justice issues, including juvenile crime and sentencing, the deterrent value of punishment, and the control of firearms. Professor Zimring served as Director of Research for the Task Force on Firearms of the National

Commission on the Causes and Prevention of Violence, and has also served as consultant to many private and public organizations.

In view of their long-standing professional interest in the legal use of social scientific evidence and their extraordinary professional competence to address those issues, amici curiae believe that their views might be of assistance to the Court. They therefore urge the Court to grant their motion and permit the submission of this brief amici curiae.

Dated: New York, New York August 29, 1986

Respectfully submitted,

MICHAEL O. FINKELSTEIN
MARTIN F. RICHMAN \*
Barrett Smith Schapiro
Simon & Armstrong
26 Broadway
New York, N.Y. 10004
(212) 422-8180

ATTORNEYS FOR AMICI CURIAE

BY: MARTIN F. RICHMAN

\*Counsel of Record



No. 84-6811

IN THE

## SUPREME COURT OF THE UNITED STATES

October Term, 1985

WARREN MCCLESKEY,

Petitioner,

- v.-

RALPH M. KEMP, Superintendent, Georgia Diagnostic & Classification Center.

On Writ of Certiorari To The United States Court of Appeals for the Eleventh Circuit

BRIEF AMICI CURIAE OF DR. FRANKLIN
M. FISHER, DR. RICHARD O. LEMPERT,
DR. PETER W. SPERLICH, DR. MARVIN
E. WOLFGANG, PROFESSOR HANS ZEISEL
& PROFESSOR FRANKLIN E. ZIMRING

### SUMMARY OF ARGUMENT

The factual questions presented by this case are among those that can be tested by established social science methods. At issue was a series of decisions and actions carried out in a single state over a limited period of time. The sources of information about those decisions were, in this case, official state files containing unusually rich and detailed data. Statistical techniques for the analysis of such data are well-developed and reliable. There are established criteria in the social science professions for evaluating the findings of such studies. This is, in sum, the kind of research that social scientists know how to do, and to evaluate with considerable confidence.

The studies at issue in this case were conducted in the State of Georgia by Professors David Baldus, George Woodworth and Charles Pulaski. The results of the Baldus studies are that Georgia defendants whose victims are white, especially black defendants, face death-sentencing rates

many times higher than those whose victims are black. This result is consistent with a solid body of previous research in this area. A natural question provoked by such findings is whether other legitimate sentencing factors might explain what initially appear to be racial differences. Yet these striking results did not disappear after searching statistical analysis by Baldus and his colleagues. Neither chance nor any legitimate sentencing considerations can explain the powerful influence of these racial factors.

The Baldus studies were conducted in careful compliance with accepted research techniques. Their design and execution were meticulous and their analytical methods were appropriate. They are among the best empirical studies on criminal sentencing ever conducted, and their results are entitled to a high degree of confidence.

The lower courts nevertheless displayed a profound and unwarranted mistrust of the Baldus studies and a misunderstanding of their results. District Court judged the Baldus data sources by unrealistic and unjustified standards. It quarreled with data collection and coding methods that are well-established and widely used. It evinced a hostility towards methods of statistical analysis -- especially multiple regression analysis -- that is utterly unwarranted, expressing a skepticism toward techniques of statistical modeling, especially analyses conducted parsimonious models, that is uninformed and indefensible. Finally, it faulted Baldus's results on a variety of minor statistical grounds that reflect, at best, a partial understanding of the deficiencies that can afflict such research and a failure to appreciate the negligible extent to which

those problems were likely to affect the essential findings reported by Baldus. As a result of this series of errors, the District Court inappropriately devalued a first-rate body of research that sheds significant light on the issues before it.

The Court of Appeals, by contrast, purported to accept the validity of the Baldus studies and to address the legal implications of their results. Yet that court seriously underestimated the magnitude of the racial effects Baldus reported -- misconceiving both the actual size of the racial disparities and their relative significance as a force in Georgia sentencing decisions. Further, even while purportedly accepting the Baldus research, the Court of Appeals demanded a level of certainty that exceeds the powers of any statistical research to achieve -- a level of certainty not approached in most employment discrimination cases or in business litigation where such statistical evidence is routinely received and often dispositive.

The Baldus results demonstrate that racial factors -- race of the defendant in white-victim cases and race of the victim throughout -- played a real, substantial and persistent role in death-sentencing decisions in the State of Georgia during the period studied. The disparities are so large that they lead to the conclusion that in black-defendant, white-victim cases-of which petitioner McCleskey's is one-it is more probable than not that the race of the victim was a determining factor, in the sense that the defendant would not have received a death sentence if his victim had not been white. The State's evidence did not contradict these strong findings, which replicate less detailed, though similar conclusions reached in other studies. Whatever the legal implications of these

facts, they should be accepted as proven to scientific satisfaction.

### ARGUMENT

I

THE BALDUS STUDIES DEMONSTRATE THAT IN THE STATE OF GEORGIA, THE RACE OF THE HOMICIDE VICTIM HAS BEEN AN IMPLICIT AGGRAVATING CIRCUMSTANCE WITH A SUBSTANTIAL IMPACT ON THE RATE OF CAPITAL SENTENCING

The unadjusted results reported by Professor Baldus for the sample of Georgia cases studied, grouped in combinations by race-of-defendant and race-of-victim, are as follows:

Table I

Death Sentences Among Defendants Convicted of Murder and Voluntary Manslaughter (DB63)

Race of Defendant / Victim	Number Receiving The Death Penalty	Percentage <sup>1</sup> Receiving The Death Penalty				
black/white	50 of 223	22				
white/white	58 of 748	8				
black/black	18 of 1443	1				
white/black	2 of 60	3				
* * *	* * *	* * *				

lRounded to the nearest percentage
point.

### Table I (continued)

Totals by Victim	Number Receiving The Death Penalty	Percentage <sup>2</sup> Receiving The Death Penalty
white victim	108 of 981	11
black victim	20 of 1503	1

In particular, as the table shows, blacks who killed whites were sentenced to death at nearly 22 times the rate of blacks who killed blacks, and more than 7 times the rate of whites who killed blacks. The capital sentencing rate for all white-victim cases was almost 11 times the rate for all black-victim cases. Unless there is an extraordinarily perfect confounding with other factors correlated with race, these very large racial disparities

<sup>&</sup>lt;sup>2</sup>Rounded to the nearest percentage point.

indicate that race is an implicit aggravating factor in the capital sentencing decision.

To test whether the disparities in capital sentencing rates were due to factors confounded with race, Professor Baldus first made cross-tabulations, controlling for the most important sentencing factors that might have been confounders. In these tests, the racial disparities did not disappear. For example, by analyzing all cases that were deatheligible under statutory aggravating factor (b)  $(2)^3$  -- murder by a defendant in the course of a contemporaneous felony, a category which included petitioner McCleskey's case -- Professor Baldus found that 38 percent (60 out of 160) of the blacks who murdered whites received the death penalty, while only 14 percent (15 out of 104) of the blacks who murdered

<sup>&</sup>lt;sup>3</sup>Former Ga. Code Ann. §27-2534.1(b)(2)

blacks received this penalty. (See DB 87)
Thus, blacks who murdered whites were sentenced to death at more than 2.5 times the rate of black-on-black cases in this category.

When Professor Baldus separated out only those, like McCleskey, whose contemporary felony was armed robbery, the disparities were even more pronounced: 30 percent (42/123) of blacks who killed whites received a death sentence, while only 5 percent (3/57) of blacks who killed blacks did. (See DB 87). These crosstabulations tell the basic story of the magnitudes of racial effects. Felony murders with white victims produce death sentences in Georgia more than twice as often as felony murders with black victims. Thus severe racial disparities in capital sentencing rates remain after controlling for the occurrence of contemporaneous felonies.

Other cross-tabular data from these studies not only establish the fact of racial discrimination but tell us where it occurs. They reveal noticeably different treatment of cases, by race, at various decision points from indictment forward. The following table, for example, addressing only Georgia cases in which a murder conviction had been obtained, reveals, by racial category, the rate at which Georgia prosecutors chose to advance cases to a capital sentencing hearing-where a death sentence was a possible outcome -- rather than permit an automatic life sentence.

Table 2
PENALTY TRIALS AMONG DEFENDANTS
CONVICTED OF MURDER (DB94)

Defendant / Victim	Number Advancing to Penalty Trials	Percentage Advancing to Penalty Trials
black/white	87 of 124	.70
white/white	99 of 312	.32
black/black	38 of 250	.15
white/black	4 of 21	.19

Thus even among convicted black defendants, where strength of the evidence factors presumably no longer played a major role, Georgia prosecutors advanced black defendants to a penalty trial, if their victims were white, at nearly five times the rate they advanced black defendants whose victims were black (.70 vs. 15), and over three times the rate of whites who killed blacks (.70 vs. .19).

Because there were insufficient numbers of cases, Professor Baldus could not use cross-tabulations to control simultaneously for combinations of possible confounding factors. This is a common problem in social science research, and to deal with it, he resorted to multiple regression analysis, using both weighted least squares and logistic regression models. These are standard statistical

methods for this type of analysis<sup>4</sup>. Both forms of analysis showed substantial racial disparities in capital sentencing rates.

It is important to understand multiple regression analysis accurately as one tool for interpreting the data in the Baldus studies. The regression exercise was intended principally to check the basic finding of the cross-tabular approach against the possibility that multiple confounders which correlated with race might explain the racial disparities even if the principal ones taken separately did not do so. Multiple regression analysis

<sup>4</sup>Multiple regression analysis is the method of choice when multiple causal factors may be at work and controlled experiments to isolate their separate impact are not possible or would not be credible. They have become an essential part of econometrics social science research, and more recently have been employed in anti-discrimination class actions, antitrust damage computations, and a variety of other legal contexts. The use of multiple regression was expressly approved by this Court in Bazemore v. Friday, \_\_\_\_ U.S. \_\_\_ (1986).

permitted Baldus to take over 230 factors simultaneously into account to see whether any combination of them might explain the racial disparities. 5 Among the regression results reported are many highly statistically significant regression coefficients for the race of the victim and the race of the defendant, employing statistical models of varying sizes. Based on those results, he found that whitevictim cases remained more than twice as likely as black-victim cases to produce death sentences after controlling for all other factors. (See DB 83). These results demonstrate that racial factors have an independent influence on death-sentencing rates after the effects of all other legitimate sentencing variables included in

<sup>&</sup>lt;sup>5</sup>Professor Baldus testified that, in his judgment, a 39-variable model best captured the essence of the Georgia system (Fed. Tr. 808); he employed larger models as part of a comprehensive effort to see whether any other combinations of variables might eliminate the racial effects.

the models have been taken into account.

In its discussion of the magnitude of the average race-of-victim effect in Georgia's capital sentencing system, the Court of Appeals focused almost exclusively on what it styled a "6%" disparity. This figure was presumably derived from the .06 least squares regression coefficient estimated for the race-of-victim variable in the 230-variable large scale multiple regression model in the Baldus studies. (DB 83). The court, confusing percent and percentage point, interpreted this "6%" average disparity to mean that "a white victim crime is 6% more likely to result in the [death] sentence than a comparable black victim crime." McCleskey v. Kemp, 753 F.2d 877, 896 (11th Cir. 1985) (en banc). The assumption of the statement is that the death sentencing rate in white-victim cases would on average be 6% higher than the rate for similarly situated black-victim cases.

Thus, for example, if the death sentencing rate in a given class of black-victim cases were 10%, the white victim rate would be 6% higher or 10.6%.

Such an interpretation is incorrect and highly misleading. The .06 race of victim regression coefficient indicates that the average death-sentencing rate in the system is 6 percentage points higher in white-victim cases than it is in similarly situated black-victim cases. The percentage increase in the rate is much greater than 6 percent at all levels of aggravation where the death penalty is given, because the base rates are low.

Having misunderstood the basic results of the Baldus studies, the lower courts, not surprisingly, also misunderstood the implications of those results for McCleskey's case. To understand these implications, one has to focus on the disparity in sentencing rates at

aggravation levels comparable to those in McCleskey's case. One can do this by looking at disparities in capital sentencing rates at the average aggravation levels for all white-victim cases (of which McCleskey's is one) or, more precisely, at the cases in the mid-range of aggravation (of which McCleskey's is also one). We examine both below.

The overall death-sentence rate in white-victim cases is 11%. Since the weighted least squares regression model cited by the Court of Appeals tells us that the overall rate in comparably aggravated black-victim cases is six percentage points less, the rate in such cases is estimated at five percent. Thus, at the average level of aggravating circumstances represented by the white-victim cases, the rate of capital sentencing in a white-victim case is 120% greater than the rate in a black-victim case.

Or to state the results

differently: in six out of every 11 death penalty cases in which the victim was white, race-of-victim was a determining aggravating factor in the sense that the defendants would not have received the death penalty if the victims had been black.

The Court of Appeals properly points out that the race-of-victim effect is concentrated at the mid-range, where it is approximately 20 percentage points. that range, the average death sentencing rates (calculated from DB 90: col. D, levels 3-7) is 14.4% for black-victim cases and 34.4% for white-victim cases, an increase of 139%. This means that out of every 34 death-penalty cases in the midrange in which the victims were white, 20 defendants would not have received the death penalty if their victims had been black.

McCleskey's case is, a white-victim

death penalty case that is in the midrange in terms of aggravating facts. Since
the statistical results show that in a
majority of such cases the death penalty
would not have been imposed if the victim
were black, one must conclude that in
McCleskey's case (as in others of the same
class) it is more likely than not that the
victim's race was a decisive aggravating
factor in the imposition of the death
penalty. Thus it is more likely than not
that McCleskey would not have received a
death sentence if his victim had been
black.

#### II

THE BALDUS STUDIES EMPLOYED EXCELLENT, PROFESSIONAL METHODS OF EMPIRICAL RESEARCH AND PRODUCED STRONG, RELIABLE FINDINGS ON THE ROLE OF RACE IN GEORGIA'S CAPITAL SENTENCING SYSTEM

The District Court, as well as the Court of Appeals, appear to have rejected the Baldus studies in large measure because of their misapprehensions about the quality

methods employed to analyze that data. In our opinion, these reservations are unwarranted: the design of the research followed accepted scientific practice, the work was carried out in a careful and thorough manner, the analytic methods were appropriate -- and the results, consequently, are reliable.

The District Court's opinion, in particular, raised a series of objections to empirical methods and procedures, almost none of which is well-founded. It asserts that Baldus's data base was "substantially flaw[ed]," McCleskey v. Zant, 580 F. Supp. 338, 360 (N.D. Ga. 1984) (emphasis omitted), because it "could not capture every nuance of every case." Id. at 356. None of Baldus's many models, even those with over 230 variables, was deemed sufficiently inclusive in the District Court's eyes, since "the final data base

was far from perfect." Id.

These objections are fundamentally misplaced. As a scientific matter, the likelihood that any omitted variable could significantly affect Baldus's robust findings -- especially when so many legitimate variable were taken into account -- is negligible. 6 For any unaccounted-for variable actually to make a difference in the Baldus findings, it would have to be substantially correlated with the race of the victim and yet substantially uncorrelated with the 230 variables defined by Professor Baldus that take into account every known, conceptually important legal and extra-legal factor that might affect capital sentencing. It is extremely unlikely that any factor that powerful has been overlooked in these studies. The

<sup>&</sup>lt;sup>6</sup>We use the term "robust" to indicate that Professor Baldus's findings do not appear to be significantly affected by variations in the specifications of the statistical models he used.

examples given by the lower court-including "looks, age, personality," see 753 F.2d at 899 -- either were in fact included in Baldus' analyses or appear unlikely to meet those qualifications. By insisting on a standard of "absolute knowledge" about every single case, the District Court implicitly rejected the value of all applied statistical analysis. Yet, as this Court has correctly pointed out in Bazemore, a complainant need only include the major variables in his analysis.

The District Court also expressed general skepticism toward a range of well-established social scientific methods employed by Baldus, including multiple regression analysis, which it found "ill suited to provide the court with circumstantial evidence of the presence of discrimination." Id. at 372 (emphasis omitted). Indeed the only statistical

method that the District Court did seem to approve is the simple cross-tabular approach, id. at 354, even though the court acknowledged that the inherent nature of the problem under study here makes it "impossible to get any statistically significant results in comparing exact cases using a cross tabulation method." Id. (emphasis omitted). This preference for cross-tabular methods lacks any scientific foundation. Baldus's use of multiple regression analysis is clearly valid and appropriate to his data. In any event, Baldus and his colleagues did use crosstabular analysis extensively, and their findings using this method, as we have seen, are fully consistent with the regression results.

Finally, in evaluating Baldus's results, the District Court seized upon a somewhat confused welter of statistical issues, including Baldus's conventions for

coding "unknown" data, id. at 357-59, the possible multicollinearity of his variables, id. at 363-64, and the reported R<sup>2</sup> of his model, <u>id.</u> at 351, 361, as reasons for its ultimate conclusion that Baldus's results could not be accepted. However, Baldus and his colleagues satisfactorily addressed each of these concerns and demonstrated that the racial results were not adversely affected by them. Baldus not only employed the correct method of treating "unknowns"; he also conducted alternative analyses demonstrate that racial influences persisted irrespective of the method of treatment adopted. Multicollinearity undoubtedly did affect some of the larger models employed by Baldus, but the District Court failed to realize that multicollinearity would not change the estimate of the reported racial results, but would only enlarge the standard error of that estimate. The standard errors were calculated in the usual way in the Baldus studies (which reflects the effects of multicollinearity) and as thus calculated, they did not deprive Baldus's results of statistical significance. Finally, the court's concern with the reported R<sup>2</sup> of Baldus's models is unfounded. Apart from the irrelevance of the R<sup>2</sup> measure for logistic models, an R<sup>2</sup> of .40 or higher is quite acceptable for the weighted least-squares models.

In sum, since the District Court's opinion was flawed by basic statistical errors and misunderstandings, its evaluation of the validity of the Baldus studies is simply off-target.

The Court of Appeals took a different approach to Baldus's research: it announced that it would "assum[e] [the study's] validity and that it proves what

it claims to prove," McCleskey v. Kemp, 753 F.2d at 886, and would base its judgment solely on the legal consequences flowing from that research. Yet the skepticism that pervaded the District Court's analysis continued to dominate the treatment of Baldus's research by the Court of Appeals. After first knitting together citations from several scholarly articles that caution courts against an unreflective use of social scientific evidence, id. at 887-90, the court announced "that generalized statistical studies are of little use in deciding whether a particular defendant has been unconstitutionally sentenced to death . . . [and] at most are probative of how much disparity is present." Id. at 893. That observation misses the point: Statistical evidence can determine with great reliability whether racial factors are playing a role in the sentencing system as a whole and whether

the disparities are so great as to tip the balance of probability that they operated in any particular case. Baldus's studies provide just such evidence.

When the Court turns to the Baldus studies, it relies primarily upon one summary figure drawn from the entire body of results -- a reported .06 disparity by race of victim in overall deathsentencing rates. As we showed above, this was but one of a number of important, meaningful results indicating a consistent racial presence in the state of Georgia's capital sentencing system. More important, as also demonstrated earlier, the Court of Appeals seemed fundamentally to have misunderstood the magnitude and significance even of this single result upon which it focused: it took a pound for a penny.

Although Baldus and his colleagues have been consistently conservative in

evaluating and reporting their findings, the adjusted influence of racial factors on Georgia's capital sentencing system remains both clear and significant. Race, especially the race of the victim, plays a large and recognizable part in determining who among Georgia defendants convicted of murder will be sentenced to life and who among them will be sentenced to death.

### CONCLUSION

The contributions of social scientific evidence to the resolution of legal issues has increased significantly in recent decades, as statistical methods have improved and the confidence of the courts has grown. This Court has led the lower federal courts toward an appreciation of the nature of statistical evidence, and has developed legal principles -- including standards of proof for parties presenting

understanding of the powerful utility of valid social scientific evidence. See, e.g., Bazemore v. Friday, \_\_U.S.\_\_, \_\_L.Ed.2d\_\_\_,(1986); Hazelwood School District v. United States, 433 U.S. 299 (1977); Teamsters v. United States, 431 U.S. 324 (1977); see also Segar v. Smith, 738 F.2d 1249 (D.C. Cir. 1984); Vuyanich v. Republic National Bank, 505 F. Supp. 244 (N.D. Tex. 1980), vacated on other grounds, 723 F.2d 1195 (5th Cir. 1984).

The Court of Appeals disregarded these basic standards of proof fashioned by the Court. Its opinion in McCleskey insists upon a level of methodological purity in data quality, model design, and analysis that cannot be achieved and is unnecessary. If such standards were to prevail, the effect would be to choke off the use of scientific methods of social research in law. Perceptions of the

judicial system and society would still inform judicial decisions, but they would be controlled by anecdote and hunch. Surely the courts can and should do better than that, particularly in cases, such as this one, that involve issues of deep social concern.

The cross-tabular and regression analyses of Professor Baldus and his colleagues were the correct analytical tools for the research they undertook. Their studies were undertaken with great care. Their findings replicate the work of earlier, less comprehensive studies. The magnitude of their findings is striking. This body of research renders it far more likely than not that racial factors have played a significant role in Georgia's capital sentencing system in the post
Furman era.

Dated: New York, New York August 29, 1986

Respectfully submitted,

MICHAEL O. FINKELSTEIN
MARTIN F. RICHMAN \*
Barrett Smith Schapiro
Simon & Armstrong
26 Broadway
New York, N.Y. 10004
(212) 422-8180

ATTORNEYS FOR AMICI CURIAE

BY:\_

MARTIN F. RICHMAN

\*Counsel of Record

### CERTIFICATE OF SERVICE

I hereby certify that I am a member of the bar of this Court, and that I served the annexed Motion for Leave to File Brief Amici Curiae and Brief Amici Curiae on the parties by placing copies in the United States mail, first class mail, postage prepaid, addressed as follows:

John Charles Boger, Esq. NAACP Legal Defense Fund, Inc. 99 Hudson Street New York, New York 10013

Mary Beth Westmoreland, Esq. 132 State Judicial Building 40 Capitol Square, S.W. Atlanta, Georgia 30334

MARTIN F. RICHMAN

Done	this	 day	of	August,	1986.	

FILED

SEP 19 1986

JOSEPH F. SPANIOL, JR.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1986

WARREN MCCLESKEY,

Petitioner,

V.

RALPH M. KEMP, Superintendent, Georgia Diagnostic & Classification Center,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF AMICUS CURIAE
OF THE WASHINGTON LEGAL FOUNDATION
AND THE ALLIED EDUCATIONAL FOUNDATION
IN SUPPORT OF RESPONDENT

DANIEL J. POPEO GEORGE C. SMITH \* WASHINGTON LEGAL FOUNDATION 1705 N Street, N.W. Washington, D.C. 20036 (202) 857-0240

Attorneys for Amici Curiae
Washington Legal Foundation
and
Allied Educational Foundation

\* Counsel of Record

Dated: September 19, 1986



### QUESTIONS PRESENTED

- 1. Whether a state's system for imposing capital punishment which has been otherwise upheld as constitutional in all respects may be held unconstitutional merely because the collective sentencing results it has produced during a given period of years do not conform to subjective notions of racial proportionality in sentencing.
- 2. Whether, in the absence of any evidence of intentional race discrimination causing the petitioner's individual death sentence, that sentence may be set aside as unconstitutional merely because the collective sentencing results of the past do not conform to subjective notions of racial proportionality in sentencing.
- 3. Whether a claim that the death penalty has been unconstitutionally imposed due to race discrimination can succeed without the necessity of proving purposeful or intentional discrimination by state actors merely by asserting the claim under the Eighth Amendment instead of under the equal protection clause of the Fourteenth Amendment.
- 4. Whether a claim that the death penalty has been unconstitutionally imposed due to race discrimination can be based upon evidence of disparities in sentencing associated solely with the race of the victim, as distinguished from the race of the defendant.
- 5. Whether the district court's factual finding that the studies relied upon by petitioner were too flawed and untrustworthy to constitute cognizable evidence of actionable sentencing discrimination was clearly erroneous.



# TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	v
INTERESTS OF AMICUS CURIAE	1
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	3
ARGUMENT	4
I. MERE FAILURE TO MAINTAIN AN "AC- CEPTABLE" DEGREE OF RACIAL PROPOR- TIONALITY IN CAPITAL SENTENCING PROVIDES NO GROUNDS FOR STRIKING AN OTHERWISE VALID CAPITAL PUNISH- MENT SYSTEM	5
A. A Death Sentence's Constitutionality De- pends Upon its Conformity with Governing Legal and Procedural Standards, Not upon its Conformity to Statistical Notions of Racial Proportionality	5
B. The Statistical Disparities Alleged Cannot Prove Discriminatory Intent, Which has been Consistently Required by the Courts as a Necessary Element of a Race-based Attack on a Death Sentence	9
C. The Standard of Statistical Proportionality Advocated fere is Unreasonable, Unwork- able, and Unjust when Applied to the Out- come of the Criminal Sentencing Process	13
II. EVEN IF A DISPARATE IMPACT STANDARD WERE APPROPRIATE IN THE CRIMINAL SENTENCING CONTEXT, PETITIONER FAILS TO MAKE A PLAUSIBLE CASE ON THAT BASIS AS WELL	17

### TABLE OF CONTENTS—Continued Page A. Petitioner's Basic Contention is Based on a 17 Myth ..... B. The Theory of Victim-based Discrimination is Legally and Logically Invalid ..... 19 C. The Findings of the District Court on the Study's Invalidity Should be Affirmed ..... 21 D. The Myriad Individualized Factors and Combinations of Factors Which Influence A Death Sentence are not Susceptible to Quantification or Precise Comparative Analysis ..... 22

CONCLUSION

25

# TABLE OF AUTHORITIES

Cases	Page
Adams v. Wainwright, 709 F.2d 1443 (11th Cir.	
1983)	9, 19
AFSCME v. State of Washington, 578 F. Supp. 846 (D. Wash. 1984), rev'd, 770 F.2d 1401 (9th	
Cir. 1985)	17
Andrews v. Shulsen, 600 F. Supp. 408 (D. Utah	
1983), appeal pending, No. 84-2781 (10th Cir.	
1986)	24-25
Britton v. Rogers, 631 F.2d 571 (8th Cir. 1980),	
cert. denied, 451 U.S. 939 (1981)	16, 20
Brogdon v. Blackburn, 790 F.2d 1164 (5th Cir.	
1986)	9
Caldwell v. Mississippi, 105 S.Ct. 2633 (1985)	13
City of Cleburne v. Cleburne Living Center, 105	
S.Ct. 3249 (1985)	16
Furman v. Georiga, 408 U.S. 238 (1972)	5-8
Godfrey v. Georgia, 446 U.S. 420 (1980)	5
Gregg v. Georgia, 428 U.S. 153 (1976)	5
McCleskey v. Zant, 580 F. Supp. 338 (1984)p	
Prejean v. Maggio, 765 F.2d 482 (5th Cir. 1985)	9
Pulley v. Harris, 104 S.Ct. 871 (1984)8-9,	
Ross v. Kemp, 756 F.2d 1483 (11th Cir. 1985)	5, 9
Shaw v. Martin, 733 F.2d 304 (4th Cir.), cert. de-	
nied, 83 L.Ed. 2d 159 (1984)	9
Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir.	
1978), cert. denied, 440 U.S. 976 (1979)7	
Stephens v. Kemp, 104 S.Ct. 562 (1983)	7
United States v. General Dynamics, 415 U.S. 486	
(1974)	22
Washington v. Davis, 426 U.S. 229 (1976)	10-11
Whitley v. Albers, 106 S.Ct. 1078 (1986)	12
Woodson v. North Carolina, 428 U.S. 280 (1976)	15
Zant v. Stephens, 462 U.S. 862 (1983)	5, 13
Other Authorities	
Fed. R. Civ. P. 52(a)	22
R. Berger, DEATH PENALTIES (Harv. Press 1982)	10

# TABLE OF AUTHORITIES-Continued

	Page
Bureau of Justice Statistics Bulletin, Capital Pun- ishment 1984, NCJ-98399 (August 1985)4,	18-20
Note, Discrimination and Arbitrariness in Capital Punishment: An Analysis of Post-Furman Mur-	
der Cases in Dade County, Florida, 1973-76, 33	
STANFORD L. REV. 75 (1980)	18-19

# In The Supreme Court of the United States

OCTOBER TERM, 1986

No. 84-6811

WARREN MCCLESKEY,

V.

Petitioner,

RALPH M. KEMP, Superintendent, Georgia Diagnostic & Classification Center,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF AMICUS CURIAE
OF THE WASHINGTON LEGAL FOUNDATION
AND THE ALLIED EDUCATIONAL FOUNDATION
IN SUPPORT OF RESPONDENT

## INTERESTS OF AMICI CURIAE

The Washington Legal Foundation ("WLF") is a non-profit public interest law and policy center based in Washington, D.C., with over 80,000 members nation-wide. WLF engages in litigation, administrative proceedings, and policy advocacy in support of the legal and constitutional values and principles on which America was founded.

WLF devotes substantial effort to asserting the rights of victims of crime and supporting effective law enforcement measures. WLF has also been a leading voice in support of the legitimacy of the death penalty from both a constitutional and policy standpoint. The Foundation's experience and expertise on this issue are reflected in the *amicus curiae* briefs it has filed in many of the leading Supreme Court decisions on capital punishment. E.g., Zant v. Stephens, 462 U.S. 862 (1983); Strickland v. Washington, 104 S. Ct. 2052 (1984); Eddings v. Oklahoma, 455 U.S. 104 (1982). WLF attorneys have also been repeatedly invited to testify before the U.S. Congress on capital punishment issues.

WLF believes the instant case is of critical importance for its potential impact on not only capital punishment law but on many broader areas where claims of racially disparate impact may be raised. If petitioner prevails here, the jurisprudence of racial and ethnic proportionality will be carried to unprecedented extremes in the governance of this nation. The notion that the duly convicted murderer of a policeman could escape an otherwise valid death sentence by invoking the race of his victim as a defense is repugnant to any decent sense of law and justice.

The Allied Education Foundational ("AEF"), established in 1964, is a non-profit charitable and educational foundation based in Englewood, New Jersey, and devoted to the pursuit of knowledge, education, and the broad public interest.

As part of its education and public interest efforts, AEF also supports the publication of books and studies on issues of law and law enforcement. Recently, for example, AEF joined with WLF in publishing a scholarly legal study on the death penalty, Capital Punishment 1986: Last Lines of Defense. A chapter of that study directly challenges the theory of discrimination in capital sentencing reflected in petitioner's argument in this case. Because AEF believes that petitioner's argument here is not only profoundly erroneous as a matter of law, but profoundly misleading in its portrayal of the American

criminal justice system, AEF's commitment to the spread of knowledge and to the rule of law have motivated it to join WLF in the following brief.

### STATEMENT OF THE CASE

In the interests of judicial economy, amicus adopts and incorporates by reference the statement of the case set forth in the Brief of the Respondent.

#### SUMMARY OF ARGUMENT

- 1. Georgia's statutory scheme for imposing the death penalty has been repeatedly upheld as constitutional under the exacting standards imposed by this Court. That indisputably constitutional system was fairly applied in petitioner's case, and there was no evidence that intentional race discrimination caused or influenced his death sentence. The mere fact that petitioner submits a study purporting to show that the collective sentencing outcomes of other Georgia capital cases fail to conform to subjective notions of racial proportionality provides no valid basis for questioning petitioner's sentence under these circumstances. Allowing death sentences to be reversed solely on the basis of disparate impact data, and without proof of actual discriminatory motive, would be unjust, unworkable, and a source of disastrous upheaval for the entire criminal sentencing process.
- 2. Even if an authentic and substantial race-based disparity in sentencing could be viewed as a valid basis for invalidating a death sentence, petitioner could not prevail on the facts of this case. Official government statistics demonstrate that, if anything, the death sentence has been disproportionately imposed on white murder defendants. Petitioner's attempt to evade that fact by shifting his claim to victim-based racial disparities cannot salvage his case. This Court has not endorsed that oblique theory of discrimination, and there is no just

or principled basis for it to do so now. Finally, the District Court's findings that the sentencing studies relied on to petitioner were fatally flawed and invalid were not clearly erroneous. They should be affirmed by this Court.

#### ARGUMENT

### **Preliminary Statement**

This case addresses the extraordinary argument that a state's otherwise valid system for imposing the death penalty should be declared unconstitutional solely because it fails to allocate death sentences in conformity with theoretical notions of racial proportionality. Neither the presence of meticulously fair sentencing standards nor the absence of any discriminatory intent is considered pertinent under this argument. All that counts is the racial breakdown of collective sentencing statistics.

Moreover, the petitioner rests his claim on the curious premise that juries would discriminate primarily on the basis of the slain victim's race, rather than that of the criminal defendant in the dock-despite the contradictory circumstance that the victim is perforce absent from the trial and the victim's race is rarely a matter of relevant concern at trial. Petitioner's reliance on this contrived theory of "victim-based" discrimination is at least understandable, however, in light of the fact that the more plausible theory of direct discrimination against black defendants does not stand up. Official studies comparing the sentencing of white and black perpetrators now establish that it is actually white murderers who disproportionately receive the death penalty. See Bureau of Justice Statistics Bulletin, Capital Punishment 1984, pp. 7, 9, Tables 11, A-1, A-2 (August 1985). This inescapable fact refutes petitioner's sweeping factual claim that the death penalty discriminates against minorities. His legal theory fares no better.

- I. MERE FAILURE TO MAINTAIN AN "ACCEPT-ABLE" DEGREE OF RACIAL PROPORTIONAL-ITY IN CAPITAL SENTENCING PROVIDES NO GROUNDS FOR STRIKING AN OTHERWISE VALID CAPITAL PUNISHMENT SYSTEM
  - A. A Death Sentence's Constitutionality Depends Upon Its Conformity With Governing Legal And Procedural Standards, Not Upon Its Conformity To Statistical Notions of Racial Proportionality

Petitioner, the duly-convicted murderer of a policeman in Fulton County, Georgia, was sentenced to death by a judge following the binding recommendation of a jury. He now claims that his death sentence should be set aside because he is black, the policeman he murdered was white, and a study he cites purports to show that death penalties are disproportionately imposed on killers of white people.

The dispositive flaw in petitioner's argument is that it utterly discounts the significance of the extensive legal safeguards incorporated in the Georgia death penalty scheme in conformity with post-Furman capital sentencing requirements. Georgia's current death penalty statute and practice have been reviewed, refined, and approved under this Court's exacting constitutional scrutiny. Gregg v. Georgia, 428 U.S. 153 (1976); Godfrey v. Georgia, 446 U.S. 420 (1980); Zant v. Stephens, 462 U.S. 862 (1983). Those cases, together with numerous lower court decisions upholding Georgia death sentences against other forms of attack, e.g., Ross v. Kemp, 756 F.2d 1483 (11th Cir. 1985), establish that the Georgia capital sentencing system has satisfactorily eliminated the kind of standardless, arbitrary sentencing discretion originally condemned in Furman v. Georgia, 408 U.S. 238 (1972). It does so by, inter alia, enumerating objective aggravating circumstances which genuinely narrow the class of persons eligible for the death penalty and by providing for "individualized determination and appellate review at the selection stage." Zant v. Stephens,

462 U.S. at 879-80. The Georgia system even exceeds constitutional requirements by providing for a form of 'proportionality review' by the Georgia Supreme Court in each case. *Id.* at 880 n. 19.

Georgia having satisfied this Court's exacting standards of fairness and procedure in capital sentencing, petitioner now urges the Court to superimpose a novel and fundamentally different requirement. He contends that the state must insure some acceptable (but unspecified) degree of racial proportionality in the allocation of the death sentence. Not only must the state ensure that minority murderers receive no more than their "proportional" share of death sentences, but it must also guarantee that those murderers who choose to kill white victims are not disproportionately sentenced to death. This approach would require generalized, class-based considerations to preempt the particulars of the individual crime in deciding whether the death penalty is justified. It is racial balancing run amuck.

How the state is expected to achieve and maintain this state of fine-tuned racial equilibrium in sentencing is not explained or addressed in petitioner's argumentsand for good reason. For to do so would only bring petitioner, full circle, to the very kind of standards which this Court has already established—and which the State of Georgia has already satisfied—as a remedy to the arbitrary and standardless sentencing practices struck down in the Furman case. Racial discrimination is merely one manifestation of the arbitrary and irrational sentencing inequities which the post-Furman capital sentencing statutes were designed to minimize and contain. A capital sentencing system which has been carefully reviewed and approved by this Court on those terms is no less constitutional merely because the collective sentencing results it produces do not conform to notions of demographic parity.

Thus, the sufficient answer to petitioner's contentions was stated by the Fifth Circuit in the leading case of

Spinkellink v. Wainwright, 578 F.2d 582, 613 (5th Cir. 1978), cert. denied, 440 U.S. 976 (1979):1

The allegation that Florida's death penalty is being discriminatorily applied to defendants who murder whites is nothing more than an allegation that the death penalty is being imposed arbitrarily and capriciously, a contention we previously have considered and rejected.

As we previously noted, this Court reads Furman, Gregg, Proffitt, Jurek, Woodson, and Roberts as holding that if a state follows a properly drawn statute in imposing the death penalty, then the arbitrariness and capriciousness—and therefore the racial discrimination—condemned in Furman have been conclusively removed.

Petitioner's contrary approach subordinates the significance of the actual procedures and practices followed in his case to the cumulative sentencing results in hundreds of remote cases tried years before, involving different crimes, different victims, different judges, and different juries. Even if validated post-Furman procedures were scrupulously adhered to throughout his case, and even if a perfectly unbiased judge and/or jury decided his sentence, the constitutionality of that sentence would be dictated by the collective statistical profile of the unrelated cases of the past. This is not a rational basis for invalidating a given murderer's sentence. It is a statistical lottery.

<sup>&</sup>lt;sup>1</sup> This very same point has been echoed in the opinions of members of this Court. E.g., Stephens v. Kemp, 104 S.Ct. 562, 564-65 (1983) (Powell, J., dissenting), where Justice Powell, joined by three other justices, flating asserted, "It should be apparent from the decisions of this Court since Gregg was decided that claims based merely on general statistics are likely to have little or no merit under statutes such as that in Georgia." [emphasis added]. This statement squarely applies to the instant case.

Petitioner's arguments make a mockery of the very core of the post-Furman approach to capital punishment—i.e., that the best means of achieving fairness and rationality in capital sentencing is by observing objective standards and procedures which limit and channel sentencing discretion without eliminating it altogether. In effect, petitioner contends that full and faithful compliance with such approved standards is futile if it does not produce (and maintain) results which conform to conclusory notions of racially "proportionate" sentencing. This "result-oriented" approach is alien to this Court's post-Furman jurisprudence on capital punishment, and should be firmly rejected.

The most significant shortcoming of the Baldus Study in this context is that it tells us nothing about the fairness and legal propriety of petitioner's trial and sentencing. There is no evidence here showing that McCleskey's conviction and sentencing were actually motivated by race discrimination— intentional or otherwise—or by any other impermissible considerations. The authors of the Baldus study themselves concede as much. 753 F.2d at 895. In fact, petitioner's entire case was conducted in faithful conformity to the rigorous procedures required for all capital proceedings under federal constitutional law and the law of Georgia.

To invalidate his sentence based upon flawed evidence of an unremarkable deviation from racial proportionality would be to subordinate settled standards of criminal procedure to the vagaries and manipulations of questionable social science theory. This Court should decline such a dubious invitation.

In rejecting the closely-related argument in  $Pulley\ v$ .  $Harris\$ that "proportionality required, this Court stressed that in light of the many other safeguards incorporated in the approved post-Furman death penalty statutes "pro-

portionality review would have been constitutionally superfluous." 104 S.Ct. at 879 [emphasis added]. The race-based statistical analysis of past sentences in capital cases is but an improvised variant of proportionality review, and it is redundant and unnecessary for the same reasons stated in *Pulley v. Harris*.

B. The Statistical Disparities Alleged Cannot Prove Discriminatory Intent, Which Has Been Consistently Required By the Courts As A Necessary Element Of A Race-Based Attack On A Death Sentence

Petitioner's arguments notwithstanding, the federal courts have consistently and properly required proof of discriminatory intent as a mandatory element of claims that the death penalty violates the Eighth and/or Fourteenth Amendments by some form of race discrimination. The cases so holding are legion. E.g., Spinkellink v. Wainwright, supra, 578 F.2d. at 612-15; Adams v. Wainwright, 709 F.2d. 1443, 1449-50 (11th Cir. 1983); Ross v. Kemp, 756 F.2d 1483, 1491 (11th Cir. 1985); Shaw v. Martin, 733 F.2d. 304, 311-14 (4th Cir. 1984), cert. denied, 83 L.Ed. 2d. 159 (1984); Brogdon v. Blackburn, 790 F.2d. 1164, 1170 (5th Cir. 1986); Prejean v. Maggio, 765 F.2d. 482, 486 (5th Cir. 1985); Andrews v. Shulsen, 600 F.Supp. 408, 426 (D.Utah 1983), appeal pending, No. 84-2781 (10th Cir. 1986).

Petitioner now asks this Court to hold that this imposing array of federal precedents is wrong, and that discriminatory intent really need not be proven at all. (Pet.'s Br. pp. 98-104). Petitioner would effectively eliminate the intent requirement by the simple expedient of recasting his equal protection/discrimination claim in the guise of an Eighth Amendment claim, and contending that discriminatory intent is wholly irrelevant to a claim of cruel and unusual punishment. (Pet.'s Br. pp. 97-103).

There are numerous dispositive flaws in this argument.

Initially, as cogently expressed by the district court (McCleskey v. Zant, supra, 580 F.Supp. at 346-47), the Eighth Amendment does not even validly apply to death penalty appeals based upon "race of the victim" disparate impact theory. Relatedly, the Eighth Circuit has held that perpetrators lack standing to assert a claim based on disparate sentencing impact in relation to the victim's race. Britton v. Rogers, 631 F.2d 571, 577 n.3 (8th Cir. 1980), cert. denied, 451 U.S. 939 (1981). See also Spinkellink, supra, 578 F.2d at 614 n.39 ("the focus of any inquiry into the application of the death penalty must necessarily be limited to the persons who receive it rather than their victims"). This Court should now hold that constitutional attacks on the death penalty based on claims of victim-related racial disparities in collective sentencing data may be maintained (if at all, see Point II.B, infra) only under the equal protection clause of the Fourteenth Amendment. Compare McCleskey v. Zant, supra, 580 F.Supp. at 347. Such claims are not remotely within the scope of the cruel-and-unusual punishment clause as contemplated and recorded by the Framers of the Bill of Rights. See R. Berger, DEATH PENALTIES, pp. 44-58 (Harv.U.Press 1982). That amendment bans only cruel and barbarous punishments, and does not purport to establish a standard of proportionality or parity for the allocation of sentences among the various classes of criminals.

Further, acceptance of petitioner's argument would effectively nullify the discriminatory intent element which is indisputably required to sustain a death penalty challenge on equal protection grounds. Washington v. Davis, 426 U.S. 229 (1976). This requirement of purposeful discrimination normally requires direct proof of actual discriminatory motive; only in the very rare circumstances where the disparate impact is so monolithic as to defy explanation on any plausible non-racial

grounds can the intent requirement be satisfied by "impact" statistics alone. Washington v. Davis, supra, 426 U.S. at 242. Here, there are so many alternative plausible explanations for the claimed racial disparities in death-sent ing 2—e.g., the demonstrated fact that white-victim muraers are a consistent "proxy" for high-aggravation felony murders (see Point II. A., infra)—that a purely statistical mode of proof is plainly foreclosed.

Whatever the required mode of proof, the specific intent requirement for claims of racially discriminatory action by the state cannot be evaded by simply presenting the claim in alternative legal garb. A claim of unconstitutional race discrimination is still just that, whether asserted under the Eighth or Fourteenth Amendment. The mandatory element of purposeful discrimination is grounded on decades of mature and considered jurisprudence; it reflects the considered judgment of our law that seemingly "disproportionate" outcomes in terms of race or other characteristics are generally explainable by a host of legitimate factors other than actionable discrimination; and it is not to be dismissed by the kind of legal sleight-of-hand attempted by petitioner in this case.

Petitioner also errs in contending that the element of intent is simply irrelevant to Eighth Amendment claims. Any shortage of caselaw explicitly stating a discriminatory intent requirement results from the simple fact that discrimination claims like petitioner's are simply inapposite to Eighth Amendment jurisprudence, the precise and proper concern of which is barbarous forms of punishment rather than a guarantee of racial equilibrium in sentencing. To the extent that the Eighth Amendment

<sup>&</sup>lt;sup>2</sup> Among these plausible alternative explanations are the myriad non-racial variables which were not taken into account by the Baldus Study in trying to explain the sentencing "discrepancies" which the petitioner is pleased to ascribe to race. See Point II.D, infra.

might be held to encompass claims of racially discriminatory sentencing, it would be utterly anomalous to hold that such claims may be established on facts which would plainly fail to violate the *Fourteenth* Amendment. It is only by virtue of the Fourteenth Amendment, after all, that the Eighth Amendment has any application to the State of Georgia's sentencing practices at all.

Further, this Court only recently reiterated that the intent and culpability of state actors is indeed relevant to Eighth Amendment claims. In *Whitley v. Albers*, 106 S.Ct. 1078, 1084 (1986), Justice O'Connor's opinion for the Court stated as follows:

It is obduracy and wantonness, not inadvertence or error in good faith, that characterize the conduct prohibited by the Cruel and Unusual Punishments Clause, . . . .

While there the Court was addressing the Eighth Amendment's application to conditions of confinement rather than methods of sentencing, the underlying principle still applies in both instances: The cruel and unusual punishment clause has no legitimate application to the merely "inadvertent" and unintentional imperfections and aberrations in our human system of criminal justice. Accord: Pulley v. Harris, 104 S.Ct. at 881.

Petitioner's contention that inadvertent statistical disparities in the distribution of death sentences violates the Eighth Amendment is a grotesque distortion of the Constitution. The Eighth Amendment has nothing to do with a requirement for precisely calibrated allocations of sentences among the various races and ethnic groups.

What the Eighth Amendment has been held to require in the allocation of the death sentence is that it not be dispensed in a wholly arbitrary and "freakish" manner, such that there is no rational justification for the decision that one man is sentenced to death while another receives only a term of imprisonment. The death penalty procedures applied in this case by the State of Georgia have conclusively passed that test, *Zant v. Stephens*, 462 U.S. at 879-80, and nothing in the Baldus studies can undermine that controlling fact.

C. The Standard of Statistical Proportionality Advocated by Petitioner Is Unreasonable, Unworkable, And Unjust When Applied To The Outcome of the Criminal Sentencing Process

This Court has repeatedly stressed that in capital cases the jury is called upon to make a "highly subjective, unique, individualized judgment regarding the punishment that a particular person deserves." Caldwell v. Mississippi, 105 S.Ct. 2633 n.7 (1985), (quoting Zant v. Stephens, 462 U.S. 862, 900 (1983). That sensitive judgment is simply not susceptible to the crude categorizations and generalizations on which all the conclusions and comparisons of the Baldus study must ultimately rest.

In *Pulley v. Harris*, supra, 104 S.Ct. at 881, this Court further acknowledged that

Any capital sentencing scheme may occasionally produce abberational outcomes. Such inconsistencies are a far cry from the major systemic defects identified in *Furman*. As we have acknowledged in the past, "there can be no 'perfect procedures for deciding in which cases governmental authority should be used to impose death.'" [citations omitted]

Petitioner's arguments cannot be reconciled with the foregoing observations. Petitioner's theory holds that any deviation <sup>3</sup> from statistically-based norms of racially

<sup>&</sup>lt;sup>3</sup> Petitioner's brief asserts that "under the constitutional principles outlined earlier, racial discrimination of any magnitude is unconstitutional." (Pet.'s Br., p. 95; emphasis added).

proportional outcomes in a capital sentencing system would "require the invalidation of that system as a whole." Pet. Br. p. 107. The disastrous practical implications of this legal theory are perhaps the best proof of its invalidity.

Initially, the Court should carefully ponder exactly what a state would be required to do in order to "rehabilitate" a capital punishment system condemned under petitioner's theory of "statistical unconstitutionality." If the reason for the system's invalidation is its failure to conform capital sentencing outcomes to "acceptable" norms of racial balance, then the only fitting remedy would presumably be one that would eliminate or rectify such disparities to the fullest extent possible. See, e.g., Swann v. Charlotte Mecklenberg, 402 U.S. 1 (1971).

It would plainly not be enough for the state to enact and implement objective procedures and standards which prevent the arbitrary and unrestricted exercise of sentencing discretion. The State of Georgia has already done precisely that, to the full satisfaction of this Court. See Gregg and Zant, supra. The only evident alternative, then, would be for the state to take more direct and positive measures—known in other contexts as affirmative action—to assure the elimination of racially disproportionate sentencing outcomes.

This would presumably and logically entail a moratorium on the execution of all black murderers and of all murderers of white victims until the offensive statistical disparity was eliminated. Executions of white murderers of black victims could presumably go forward, since neither "defendant-based" nor "victim-based" racial bias could be credibly asserted in such cases. If this seems a bizarre and distorted remedy, it is because precisely such a remedy is required to fit the distorted and anomalous logic of petitioner's legal theory.

There is really no remedy which could satisfy the unreasonable and unrealistic standards of class-based justice advanced by petitioner in this case. Petitioner's purported concern that racial factors infect the sentencer's decisions in capital cases could only be resolved by the abolition of all jury discretion and the adoption of a mandatory death penalty approach (or, of course, complete abolition). But this Court has already rejected such an approach, Woodson v. North Carolina, 428 U.S. 280 (1976), in favor of a regime which consciously tolerates the occasional variances produced by the sentencer's discretion as long as they are rationally governed by objective limitations and standards. Pulley v. Harris, 104 S.Ct. at 881. Acceptance of petitioner's arguments in this case would require the abandonment of these fundamental principles of post-Furman capital punishment law.

The logic of petitioner's theory entails further practical repercussions which are incompatible with any viable system of criminal sentencing.

If a state's capital sentencing system is invalid for its failure to produce racially proportionate outcomes, then what of the other forms of criminal sentencing? For example, if those sentenced to death in Georgia were instead sentenced to life imprisonment without possibility of parole, would the racial proportionality argument lose all of its force—such as it is—merely because the death penalty was no longer implicated? Nothing in the core logic of petitioner's argument so indicates.

Indeed, petitioner's primary argument in this case is phrased as follows (Pet.'s Br. p. 32): "A. The Equal Protection Clause of the Fourteenth Amendment Forbids Pacial Discrimination in the Administration of Criminal Statutes." [emphasis added]. Although this point is unassailable by itself, petitioner insistently equates collectively "disproportionate" sentencing outcomes with the actionable racial discrimination he refers to. The argument therefore plainly extends the demand for racial equilibrium in sentencing to other serious criminal pen-

alties (e.g., life imprisonment), if not to all criminal penalties. Compare Britton v. Rogers, 631 F.2d 572 (8th Cir. 1980), where the court rejected the argument that racially disparate sentencing outcomes in past rape cases justified habeas corpus relief.

The implication is clear. Acceptance of petitioner's argument would open the door to Title VII-style "disparate impact" challenges to criminal sentences of all kinds. The entire criminal sentencing process would become bogged down in the same morass of "underutilization" concepts, multivariate regression analysis, and "goals" or quotas which now complicate employment discrimination law.

Nor do the radical implications end there.

If the Constitution requires collective sentencing outcomes to satisfy some acceptable norm of racial proportionality, what then of the other "suspect" classifications under this Court's Equal Protection jurisprudence? For example, discriminations based on alienage or on national origin now trigger the same degree of scrutiny as race discrimination. City of Cleburne v. Cleburne Living Center, 105 S. Ct. 3249, 3255 (1985). Moreover, it is now recognized that gender-based classifications "also call for a heightened standard of review," City of Cleburne, 105 S. Ct. at 3255, as do those based upon illegitimacy. Id.

Accordingly, petitioner's theory would also require proportional allocation of capital sentences with respect to such classifications as alienage, ethnicity, sex, and legitimacy. If black murderers are entitled to invalidate their death sentences on grounds of statistical disparate impact, it would follow that those falling within the other specially protected classifications are entitled to produce additional studies showing analogous forms of disparate impact as to their respective groups. Further, petitioner's argument would allow defendants of all classifications to challenge their sentences based on corresponding

variants of petitioner's theory of *victim*-oriented discrimination—e.g., a claim that those who murder American citizens are more likely to receive the death sentence than those who murder resident aliens. Such a claim would stand on the *exact* same constitutional footing as the claim at issue here. All of these predictable repercussions would hopelessly complicate the state's efforts to enforce capital punishment systems which have already been upheld as valid by this Court.

These are not exaggerated alarms, but merely acknowledgement of the logical consequences that could follow the Court's acceptance of petitioner's radical theory. Just as theories of statistical-based employment discrimination have produced permutations once deemed inconceivable, e.g., AFSCME v. State of Washington, 578 F.Supp. 846 (D.Wash. 1984), rev'd, 770 F.2d 1401 (9th Cir. 1985), so too would endorsement of petitioner's theory of disparate impact in sentencing lead to bizarre and unforeseen applications as well.

No workable system of criminal justice could accommodate the demands for race- and class-based parity in sentencing advanced by petitioner. Nor does the Constitution require a regime of "statistical justice" which would subject the validity of every criminal sentence to the vagaries and manipulations of fluctuating demographic data.

- II. EVEN IF A DISPARATE IMPACT STANDARD WERE APPROPRIATE IN THE CRIMINAL SENTENCING CONTEXT, PETITIONER FAILS TO MAKE A PLAUSIBLE CASE ON THAT BASIS AS WELL
  - A. Petitioner's Basic Contention is Based on a Myth

The core premise of petitioner's argument is the persistently repeated charge that the death penalty as administered today pervasively discriminates against blacks. The problem with this key premise is that it is demonstrably false.

In a comprehensive study of sentences imposed on thousands of killers during the period 1980-1984, the Justice Department's Bureau of Justice Statistics has discovered that it is white defendants who are disproportionately sentenced to death and disproportionately executed in this country. Bureau of Justice Statistics Bulletin, Capital Punishment 1984, NCJ-98399, pp. 7-9, Tables 11, A-1, A-2 (August 1985) (hereafter cited as "BJS Bulletin").

The BJS report shows that for every 1,000 whites arrested on homicide charges, approximately 16 were sent to prison under sentence of death. BJS Bulletin. at p. 9, Table A-2. In comparison, fewer than 12 blacks for every 1,000 arrested on the same charges were sent to death row. The data indicates that white perpetrators as a group are 36% more likely to be sentenced to death than black perpetrators of comparable capital offenses.

Further, white homicide convicts on average run a significantly greater likelihood than their black peers (i.e., 55% more likely) of actually being executed subsequent to death sentence. From 1977 to 1984, 1.7% of all death row whites were actually executed, compared to only 1.1% of blacks on death row. *Id.*, p. 7, Table 11.

These nationwide figures are not to suggest that the death penalty as administered actually discriminates against white perpetrators. The complex combination of factors involved in each individual homicide is so unique and personalized that attempts to draw legitimate inferences from such generalized class-based sentencing variations are futile.

But the BJS statistics do discredit petitioner's sweeping contention that anti-black discrimination permeates the capital sentencing process. Moreover, other reputable studies undercut the claims of *victim*-anchored race discrimination in capital sentencing as well.<sup>4</sup> In sum, the

<sup>&</sup>lt;sup>4</sup> See, e.g., Note, Discrimination and Arbitrariness in Capital Punishment: An Analysis of Post-Furman Murder Cases in Dade

image of a pervasively discriminatory criminal justice system which petitioner seeks to convey as a means of attacking the death penalty is flatly inaccurate.

Petitioner might protest that the BJS Bulletin reflects nationwide data and is therefor technically irrelevant to a murder conviction under Georgia state law. But by the same reduction logic, the *state*-wide data relied upon for petitioner's most strongly-asserted contentions would also be over inclusive.

A truly-focused study for purposes of legitimate, "apples-to-apples" comparison between petitioner's sentence and those in like cases-and one which eliminates cross-regional and urban/rural factors which might also account for sentencing disparities-would have to be confined to (1) murders of law enforcement officers (2) in Fulton County only. Such a comparison with cases truly similar to his own would seem an obvious prerequisite to an individual claim of discriminatory sentencing. However, the limited number of such cases (i.e., sixsee 580 F. Supp. at 378) is too small to allow for any valid statistical analysis or comparison. See, e.g., Adams v. Wainwright, supra, 709 F.2d at 1449; Andrews v. Shulsen, supra, 600 F.Supp. at 426. Accordingly, if the Court were to limit the proof to truly comparable cases within the specific prosecution venue, the statistical approach is plainly unsuitable due to insufficient data.

### B. The Theory of Victim-Based Discrimination is Legally and Logically Invalid

Petitioner's curious reliance on the oblique "race-ofthe-victim" approach is best explained by the fact that focusing strictly on race of the defendant simply would

County, Florida, 1973-76, 33 STANFORD L. REV. 75, 100-01 (1980), which demonstrates that the seeming predominance of death sentences in the case of white-victim murders by blacks is fully explained by the fact that such killings disproportionately account for the highly aggravated felony-murders which allow and motivate death sentences.

not work. As clearly demonstrated by the district court, 580 F.Supp. at 368, by the Court of Appeals, 753 F.2d. at 887, and by the *BJS Bulletin*, *supra*, the death penalty is not disproportionately applied to black defendants. On the contrary.

Although Eleventh and Fifth Circuit cases have broadly assumed that a death sentence may be challenged on the alternative grounds of *victim*-based disparate impact statistics, that theory is by no means established as the Law of the Land.

Some courts have displayed well-founded skepticism towards this oblique and "once-removed" method of attempting to prove discrimination. In Spinkellink v. Wainwright, 578 F.2d at 614 n.39, the Fifth Circuit approvingly quoted the district court's ruling that challenges to the application of the death penalty "must necessarily be limited to the persons who receive it rather than their victims". In Britton v. Rogers, supra, 631 F.2d at 577 n.3, the Eighth Circuit held that convicted criminals lack standing to challenge victim-based racial discrepancies in sentencing. And the district court in the instant case opined that such victim-based claims are not cognizable under either the Eighth Amendment of the equal protection clause of the 14th Amendment. 580 F.Supp. at 347.

These concerns are well-taken, and should command the careful attention of this Court. A murderer freely selects his own victim; it would therefore be grotesquely ironic for this Court to hold that the slain victim's race can be subsequently invoked by the murderer as a shield against his just punishment. Yet that is exactly what the petitioner is doing in this case. A more distorted variant of the doctrine of just tertii would be difficult to imagine.

There are other convincing reasons why the Baldus study's race-of-the-victim statistics cannot serve as a

valid or reliable basis for overturning death sentences. For instance, the record shows that the Baldus study was unable to account for the race of the victim in 62 of the cases it examined. 580 F.Supp at 358. This raises the question of precisely how the Baldus study was able to verify that the juries in all the studied cases had actually considered clear and reliable evidence of the race of the victim. After all, the murder victim is not present at the trial and the victim's race is not normally a contested point requiring proof or authentication. Therefore, it is not at all clear that reliable evidence of the victim's race is uniformly and unambiguously conveyed to the jury in every case.

Yet the Baldus study and petitioner's arguments rest on the assumptions that Georgia juries invariably have an accurate and unambiguous understanding of the victim's race—and that they ascribe significance to that information. We submit that such an assumption is invalid, providing further grounds for rejecting petitioner's race-of-the-victim theory.

### C. The Findings of the District Court on the Study's Invalidity Should be Affirmed

In a thorough and painstaking analysis that warrants this Court's careful attention, the trial court made convincing first-hand findings that the Baldus study was riddled with errors in its data base and was not essentially trustworthy; relied on statistical models which were not sufficiently predictive to support an inference of discrimination; and did not even compare like cases in purporting to find racially disparate impact. 580 F.Supp. at 354-365.

For reasons not clearly expressed, the Court of Appeals did not overtly pass judgment on these findings of fact. Instead, it chose to "assume" the Baldus study's validity and proceeded to hold that petitioner's argu-

ments failed as a matter of law even given that assumption. 753 F.2d at 894.

Contrary to petitioner's disingenuous suggestions, however, the Court of Appeals in no way disturbed or questioned the trial court's actual findings of the study's invalidity. Indeed, it expressly disclaimed any intent to do so. *Id.* at 894-95.

Under Fed. R. Civ. P. 52(a), the Court of Appeals could have set aside the district court's findings of fact only if they were "clearly erroneous." *United States* v. General Dynamics, 415 U.S. 486 (1974). Obviously, the Court of Appeals did not do that in this case. So the trial court's findings stand unimpeached.

Therefore, if this Court does not affirm the Eleventh Circuit's holding on the legal issues, petitioner's death sentence should still be affirmed on the ground that the Baldus study is too flawed and untrustworthy to raise a genuine issue of racially disparate sentencing. Given the manifest thoughtfulness and thoroughness of the district court's findings, there is no sound reason for this Court to avoid passing on whether they are clearly erroneous. And it would be a presumptuous appellate court indeed that would dismiss the trial court's deliberate and painstaking demonstration of the study's many palpable flaws as "clearly erroneous."

#### D. The Myriad Individualized Factors and Combinations of Factors Which Influence A Death Sentence Are Not Susceptible To Quantification Or Precise Comparative Analysis

Petitioner's theory of discrimination is only as good as the precision and reliability of its base data, the predictive capacity of its statistical models, and the essential equivalency of the cases it purports to compare. The district court's thorough scrutiny of the Baldus study produced unassailable findings that it is substantially deficient in each of those critical aspects. 580 F.Supp. at 354-365.<sup>5</sup> The study therefore fails to establish the factual predicate which is necessary even to *reach* petitioner's novel legal theory.

Putting aside the mere flaws, mistakes and inconsistencies of the study, amici would call the Court's attention to what we consider to be a fatal and inherent fallacy in petitioner's methodology. Petitioner's lawyers and "experts" claim that they carefully recorded and accounted for some 200 legitimate sentencing variables (e.g., various aggravating and mitigating factors) in attempting to isolate the "inexplicable" sentencing discrepancies which they then blithely assigned to the race factor. The problem with this approach is that (a) they did not even thoroughly account for the factors which they claim to have accounted or "controlled" for; and (2) the limited number of sentencing factors which they did choose to account for did not even begin to exhaust the vast range of legitimate sentencing variables (and combinations thereof) which can result in a legitimate, non-discriminatory sentencing variation.6

One particular example of these fundamental flaws is illustrative but by no means exhaustive.

In demonstrating the numerous flaws infecting the data base of the Baldus studies, the district court found that the students who coded the various sentencing factors affecting each case were limited by the study's structure to entering only *one* method of inflicting death. As the court found, 580 F.Supp. at 356:

<sup>&</sup>lt;sup>5</sup> Several professors or scholars who have a professional interest in the acceptability of statistical studies as binding proof in litigation have filed a brief amicus curiae supporting the complete validity of the Baldus studies. This Court should regard such palpably self-serving arguments with maximum skepticism.

The district court expressly so found, 580 F.Supp. at 364: "[The Baldus studies] do not account for a majority either of aggravating or mitigating circumstances in the cases."

The effect of this would be to reduce the aggravation of a case that had multiple methods of inflicting death. In coding this variable the students generally would list the method wat actually caused the death and would not list any other contributing assaultive behavior. R463. [emphasis added].

The effect of such crude limitations on the accurate depiction of different capital cases can best be understood by observing how they would apply to the coding of an actual case.

In Andrews v. Shulsen, 600 F.Supp. 408 (D.Utah 1984), appeal pending, No. 84-2781 (10th Cir.), the defendant and his accomplice murdered three people and brutally injured two others while robbing a Hi Fi shop in Ogden. Utah. The immediate cause of death in the murders was simply shooting. But before the fatal shootings, the defendants had (a) attempted to force the father of one of the victims, at gunpoint, to pour poisonous liquid drain cleaner down the throats of his own son and two other bound teenage victims (he refused); (2) forcefed the poisonous drain cleaner to the hapless victims, then taped their mouths shut: (3) raped one of the teenage girl victims before methodically shooting her in the head: (4) attempted to strangle the father-victim with an electric cord; and (5) viciously kicked a long ballpoint pen deep into the father's ear.

It is obvious from the district court's findings that the Baldus study's methodology would not begin to capture or account for all the hideous particulars and compounded variables which moved a Utah jury to vote for the death sentence in *Andrews* v. *Shulsen*. The cause of death would have been listed by the coders as a shooting (see 580 F.Supp. at 356). Clearly, the collective horrors of such a case cannot be reduced to neatly coded variables in a statistician's pigeon holes. This incapacity to capture the intangible but critical nuances of actual

murders undercuts the authenticity of all the study's comparisons of supposedly similar cases.

As it turns out, the murderers in Andrews v. Shulsen were black and their victims were white. The perpetrators in that case have appealed their death sentences, asserting the same claim of racially discriminatory sentencing presented in the instant case. If petitioner prevails here, the just death sentences of the likes of the "Hi-Fi" murderers will be absurdly attributed to racial factors in the eyes of the law, rather than to the malicious particulars which in fact account for them. Nothing in the Constitution or this Court's capital punishment jurisprudence requires such an unreasonable and unjust result.

#### CONCLUSION

For all the foregoing reasons, the decision of the Eleventh Circuit should be affirmed.

Respectfully submitted,

DANIEL J. POPEO GEORGE C. SMITH \* WASHINGTON LEGAL FOUNDATION 1705 N Street, N.W. Washington, D.C. 20036 (202) 857-0240

Attorneys for Amici Curiae
Washington Legal Foundation
and
Allied Educational Foundation

\* Counsel of Record

Dated: September 19, 1986

Supreme Court, U.S.

IN THE SUPREME COURT OF THE UNITED

86

JOSEPH F. SPANIOL, JR., CLERK

October Term, 1986

WARREN MCCLESKEY,

Petitioner,

vs.

RALPH M. KEMP, Superintendent, Georgia Diagnostic and Classification Center,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

Brief of Amici Curiae State of California, by John K. Van de Kamp, Attorney General, and County of Los Angeles, by Ira Reiner, District Attorney, In Support of Respondent

JOHN K. VAN DE KAMP Attorney General of the State of California

IRA REINER District Attorney of Los Angeles County

MICHAEL C. WELLINGTON Supervising Deputy Attorney General GEORGE M. PALMER Deputy District Attorney

SUSAN LEE FRIERSON Deputy Actorney General HARRY B. SONDHEIM
[Counsel of Record]
Head Deputy
District Attorney
849 South Broadway
11th Floor
Los Angeles,
California 90014

(213) 974-5917

3580 Wilshire Boulevard, Suite 800 Los Angeles, California 90010 (213) 736-2236

Pills



#### TABLE OF CONTENTS

Page	e
INTEREST OF AMICI CURIAE	1
SUMMARY OF ARGUMENT 1	0
ARGUMENT 1	3
I	
THE NATURE OF THE DECISION-MAKING PROCESS IN A CONSTITUTIONAL CAPITAL SENTENCING SYSTEM JUSTIFIES REQUIRING MORE THAN THE LEVEL OF DISPARATE IMPACT PROFFERED BY PETITIONER TO ESTABLISH A PRIMA FACIE CASE OF PURPOSEFUL INVIDIOUS DISCRIMINATION IN THE IMPOSITION OF THE DEATH	
PENALTY 1	3
A. The Strict Procedural Safeguards Built Into the Capital Sentencing Process Justify Applying the General Rule That Disparate Impact Alone Is Insufficient to Support a Claim of Discrimination	9
B. The Number, Complexity and Subjectivity of Factors Considered in Capital Sentencing Make Evidence of Disparate Impact Alone Insufficient	3
C. Petitioner's Showing 2	8

# TABLE OF CONTENTS (Continued)

		Page
	II	
THE AND STA REA	CH CAPITAL CASE IS UNIQUE AND COMPARISON OF ONE CASE WITH OTHER, THROUGH THE USE OF ATISTICAL ANALYSIS, CANNOT ASONABLY BE EXPECTED TO YIELD LID RESULTS	31
Α.	Use of Generalized Statistical Studies of Capital Sentencing Decisions Has Been Uniformly Rejected by Lower Courts	34
В.	Capital Sentencing Decisions Are Different From Decisions In Other Contexts	35
c.	Critical Factors in Capital Sentencing Decisions Cannot Be Accurately and Reliably Measured	39
D.	A Generalized Statistical Analysis of Capital Sentencing Decisions in Georgia Cannot Explain the Reasons Why Petitioner Was Sentenced to Death	43
E.	Conclusion	11

### TABLE OF CONTENTS

(concinded)	Dage
	Page
III	
PETITIONER'S STATISTICAL ARGUMEN	T
UNDERMINES THE RIGHT TO TRIAL BY	
JURY AND SUBSTITUTES IN ITS PLACE	E
TRIAL BY STATISTICAL ANALYSIS	46
CONCLUSION	50

### TABLE OF AUTHORITIES

#### Cases

Cases	Page
Abney v. United States, 431 U.S. 651 (1977)	47
Adams v. Wainwright, 709 F.2d 1443 (11th Cir. 1983)	34
Alexander v. Louisiana, 405 U.S. 625 (1972)	38,39
Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252 (1977) 15,16	,17,28,33
U.S. (1986)	16,17,20
Castaneda v. Partida, 430 U.S. 482 (1977)	24,33,38
Dothard v. Rawlinson, 433 U.S. 321 (1977)	40
Duncan v. Louisiana, 391 U.S. 145 (1968)	46,47
Eddings v. Oklahoma, 455 U.S. 104 (1982)	25-26
Gomillion v. Lightfoot, 364 U.S. 339 (1960)	15,31,33
Gregg v. Georgia, 428 U.S. 153 (1976)	19,49-50

### Cases

	Page
Hernandez v. Texas, 347 U.S. 475 (1954)	27
Keely v. Westinghouse Electric Corp., 404 F.Supp. 573	
(E.D.Mo. 1975)	50-51
Lockett v. Ohio, 438 U.S. 586 (1978)	25
Lockhart v. McCree,	
90 L.Ed. 2d 137 (1986)	39-40
McCleskey v. Kemp, 753 F.2d 877	
(11th Cir. 1985)	21,27
McCleskey v. Zant, 580 F.Supp. 338	27
(N.D. Ga. 1984)	27
McCorquodale v. State, 211 S.E.2d 577 (Ga. 1974)	37
People v. Frierson, 25 Cal.3d 142 (1979)	4
People v. Harris, 28 Cal.3d 935 (1981)	41
People v. Jackson, 28 Cal.3d 264 (1980)	4,42

#### Cases

Cases	
	Page
Pulley v. Harris, 465 U.S. 37 (1984)	4,22,41
Shotwell Mfg. Co. v. United States, 371 U.S. 341 (1963)	47
Smith v. Balkcom, 660 F.2d 573, as mod. 671 F.2d 858 (5th Cir. 198	2) 34,35
Spaziano v. Florida, 468 U.S. 447 (1984)	19
Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978)	34
Stephens v. Kemp, 464 U.S. 1027 (1983)	34-35
Taylor v. Louisiana, 419 U.S. 522 (1975)	47
Teamsters v. United States, 431 U.S. 324 (1977)	33-34,44-45
Turner v. Murray, U.S., 90 L.Ed. 2d 27 (1986)	20
Washington v. Davis, 426 U.S. 229 (1976)	16,17,24-25,33

Cases	
	Page
Wayte v. United States,	
U.S. 84 L.Ed. 2d 547 (1985)	16
Yick Wo v. Hopkins, 118 U.S. 356 (1886)	15,31,32
118 0.5. 356 (1886)	13,31,32
Constitution	
United States Constitution:	
Eighth Amendment	5,13,17
Fourteenth Amendment	5,13,15,17
Sixth Amendment	46
Statutes	
Cal. Pen. Code:	
§ 190	3
Cal. Stats.:	
1977, ch. 316	3
Rules	
U.S. Supreme Court Rule 36.4	1

### Miscellaneous

	Page
Kleck, Life Support for Ailing	
Hypotheses: Modes of	
Summarizing the Evidence for	
Racial Discrimination in	
Sentencing, 9 Law and Human	
Behavior, at 271 (1985)	12
Baldus and Cole, Statistical	
Proof of Discrimination,	
at 5 (1980)	44
Walker & Walker, The English	
Legal System, at 229 (1980)	46

Amici curiae, the State of California by John K. Van de Kamp, Attorney General, and the County of Los Angeles (a political subdivision of the State of California), by Ira Reiner, District Attorney, submit this brief in support of respondent pursuant to Rule 36.4 of the Rules of the Supreme Court of the United States.

#### INTEREST OF AMICI CURIAE

John K. Van De Kamp, Attorney General for the State of California and Ira Reiner, District Attorney for the County of Los Angeles, State of California, jointly represent the People of the State of California in the case of In re Earl Lloyd Jackson, Crim. 22165, pending before the California Supreme Court on petition for writ of habeas corpus. Said case is pending before a referee appointed by the California Supreme Court to take evidence on three issues, one of which is highly

pertinent to the instant case: Whether "death sentences in California have been discriminatorily imposed on the basis of (1) the race of the victim; (2) the race of the defendant; and/or (3) the gender of the defendant."1/ Amici curiae have been litigating just the discovery aspect of this case for over two years. This order for a reference hearing was granted on the basis of a statistical analysis of limited data on death and life-withoutpossibility-of-parole cases. It is the theory of the defense in Jackson that a statistical analysis of death and lifewithout-possibility-of parole cases will show that persons who kill white victims,

<sup>1.</sup> All of the factual representations made in this brief are based upon matters set forth in the record as well as the personal experiences of the government attorneys who have litigated, before the California Supreme Court and its appointed referee, the petition for writ of habeas corpus in the Jackson case.

and male, black defendants are more likely to be charged with and to receive the death penalty because of these unconstitutional racial/gender factors than are persons in other racial/gender categories.

Defendant Jackson, who is black, was charged with murdering two elderly white women in two separate burglaries of their residences in August and September 1977. These charges made him eligible for the death penalty pursuant to California Penal Code section 190 et seq. 3/ After a jury

The race of defendant Jackson as well as the race of his two victims are not alleged or referred to in the Information.

<sup>3.</sup> The law under which Jackson was convicted and sentenced (Stats. 1977, Ch. 316), enacted August 11, 1977, requires that one or more "special circumstances" be alleged and found true by the trier of fact before capital punishment may be imposed. This law was repealed, and essentially reenacted as modified, by the "Briggs Initiative", passed by the voters and effective November 7, 1978, principally to expand the number of special circumstances making a person eligible for capital punishment.

verdict finding him guilty as charged and imposing the death penalty, a judgment was rendered in March 1979, sentencing him to death. On his automatic appeal to the California Supreme Court, the judgment was affirmed and a concurrent petition for writ of habeas corpus was denied. People v. Jackson, 28 Cal.3d 264 (1980). The law under which defendant Jackson was sentenced has been held constitutional on its face by this Court and the California Supreme Court. Pulley v. Harris, 465 U.S. 37 (1984); People v. Frierson, 25 Cal.3d 142, 12-195 (1979).

Defendant Jackson filed a subsequent petition for writ of habeas corpus, which is the basis for the reference hearing ordered by the California Supreme Court. That court first ordered the reference hearing to address two unrelated issues.

Defendant Jackson then moved to
expand the reference hearing on the theory
that a statistical analysis of capital
case data showed evidence of race and
gender discrimination in violation of the
Eighth and Fourteenth Amendments to the
Federal Constitution.

In support of his application, he offered inter alia the declaration of Dr. James Cole, Ph.D., a statistician, who analyzed race and gender homicide data published annually by the Bureau of Criminal Statistics, a division of the State Attorney General's Office, and data supplied by the State Public Defender's Office. Using a total of three variables (victim race, defendant race, defendant sex) for all state-wide homicides, all state-wide robbery murders, and all robbery-murders in Los Angeles County, in various combinations of what is princi-

pally a cross tabulation analysis,

Dr. Cole concluded, without reference to
other circumstances of any cases, that
killers of white victims are five times
more likely to receive the death penalty
than killers of non-white victims.

Similar proportions were found for black
defendants when compared to other groups.

On this basis, the reference hearing was ordered expanded to address the issue of whether death sentences in California have been discriminatorily imposed on the basis of race of victim, race of defendant, or gender of defendant.

Subsequently, defendant Jackson moved for discovery of a virtual mountain of statewide homicide data. Jackson requested and was granted an order compelling the District Attorney of Los Angeles County to provide this data, even though most of the data is a matter of

public record, located outside the jurisdiction of Los Angeles County. 4/

poenaed homicide data from all of the Superior Court Clerks in the 58 counties throughout the State as well as other entities such as the Administrative Office of the Court. Because of the complex nature of the task of obtaining even limited data from the Clerks, and because not one single Clerk's Office maintains such data on computers, the process of obtaining the data was time-consuming and expensive. Clerks' records in literally thousands of cases had to be individually identified, categorized and reviewed to

<sup>4.</sup> For a more detailed exposition of the order and what followed, the Court is respectfully referred to Argument I of the Brief of Amici Curiae, State of California and County of Los Angeles, filed in the case of Hitchcock v. Wainwright, No. 85-6756, now pending before this Court on Writ of Certiorari.

months, this effort by several lawyers and numerous Court Clerks and their staffs was completed, the product of this effort was found to be highly questionable in terms of its quality. For example, some categories of data by the Los Angeles County Clerk's Office are subject to a 50% plus error rate and there is reason to believe that data submitted by other Clerks from throughout the State may also be subject to error.

The discovery process itself heightens the interest of amici in the instant case. Data gathering must take place before a statistical challenge to the death penalty can be mounted. The fact that the data gathering process may differ from one jurisdiction to another, and the fact that it may occur in the absence of a court order, as in the instant case, are

not significant. Regardless of who gathers the data, it will be a time-consuming, expensive process. This, in turn, causes inordinate delay in the judicial process. The quality of the product of discovery (the data) may be highly questionable. It may, as in <a href="#">Jackson</a>, be subject to significant error. More importantly, as we set forth in Argument II, <a href="infra">infra</a>, a capital case cannot be reduced to statistical data which accurately reflects how and why the jury reached its decision.

Since the issues presented in the instant case are so closely related to those of the <u>Jackson</u> case, amici curiae have concluded that the outcome of the instant case will have a substantial impact upon the administration of criminal justice, and the death penalty law in particular, throughout California.

Amici's experience in the <u>Jackson</u> case has made us familiar with the nature of the discrimination issues and the arguments offered by petitioner in this case.

## SUMMARY OF ARGUMENT

When a state imposes its death penalty under a constitutional system which by its very design minimizes any risk of arbitrariness, generalized claims of arbitrariness in the imposition of that state's death penalty should be foreclosed. Only a particularized and factually supported claim of purposeful invidious discrimination in the imposition of petitioner's own death sentence should have entitled petitioner to a hearing.

The nature of the decision-making process in a constitutionally valid capital-sentencing system justifies requiring more than the evidence of disparate impact proffered by petitioner to

establish a prima facie case of purposeful invidious race discrimination. This decision-making process is distinctly different from other decision-making contexts in that it is more complex and it contains many more safeguards against purposeful discrimination. Thus, only evidence of a stark pattern could ever suffice to demonstrate a prima facie case of discrimination in the imposition of the death penalty.

Moreover, such a stark pattern of race discrimination can never be demonstrated through the use of a statistical analysis, no matter how sophisticated the methodology. Each case is unique, involving its own quantum of variables, which are not comparable to any other set of variables. The factors found in the evidence which move a jury to impose capital punishment, even when identified,

are impossible to measure accurately.

Thus, no statistical analysis of capital eligible cases will yield a valid result.

Finally, petitioner's argument, when reduced to its essence, is an assault upon the judicial system itself, for it postulates that no jury's decision can ever be trusted unless it passes the litmus test of a statistical analysis. This proposition is unacceptable as a matter of constitutional law.5/

<sup>5.</sup> Petitioner cites many articles from law reviews and other treatises to demonstrate that study after study has found evidence of race discrimination in the imposition of the death penalty specifically, and in sentencing generally, in Georgia and other states in the South. Neither time nor space permits us the luxury of answering the contentions made in these many articles. However, a recent, objective review of some of these studies and their conclusion may be found in Kleck, Life Support for Ailing Hypotheses: Modes of Summarizing the Evidence for Racial Discrimination in Sentencing, 9 Law and Human Behavior, at 271 (1985).

### ARGUMENT

I

THE NATURE OF THE DECISIONMAKING PROCESS IN A CONSTITUTIONAL CAPITAL SENTENCING
SYSTEM JUSTIFIES REQUIRING
MORE THAN THE LEVEL OF
DISPARATE IMPACT PROFFERED
BY PETITIONER TO ESTABLISH
A PRIMA FACIE CASE OF PURPOSEFUL INVIDIOUS DISCRIMINATION IN THE IMPOSITION OF
THE DEATH PENALTY

Petitioner contends that he presented a prima facie case of discrimination in the imposition of the death penalty in Georgia, that his proof was unrebutted and that it was sufficient to support a finding that Georgia's entire capital sentencing system has been unconstitutionally applied in violation of the Eighth and Fourteenth Amendments on the basis of the race of the victim. Amici curiae urge that petitioner's proof consisted, at most, of little more than a relatively small pattern of disparate

impact which was legally insufficient to constitute a prima facie case of discrimination, much less to support a finding that Georgia's entire facially constitutional capital sentencing system has been applied unconstitutionally.

The essence of petitioner's submission is that the minimal standards required to prove racial discrimination in the context of job promotion or selection of a jury should apply in the context of capital sentencing. Brief for Petitioner at 31-32. Amici curiae urge that such minimal standards should not apply to proof of racial discrimination in the capital sentencing context. As we shall demonstrate, given the nature of the decision-making process in a constitutional capital sentencing system, the general rule should be followed that, when proof of disparate impact alone is

offered, only "a pattern as stark as that in Gomillion 6/or Yick Wo" 7/will be determinative on the issue of purposeful invidious iscrimination. Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252, 266 and fn. 13 (1977).

Whenever governmental action is claimed to be racially discriminatory in violation of the Equal Protection Clause of the Fourteenth Amendment, the "invidious quality" of that action "must ultimately be traced to a racially

<sup>6.</sup> In Gomillion v. Lightfoot, 364 U.S. 339 (1960), a state redefined a city's boundaries in such a manner that the formerly square-shaped city became a 28-sided city with the result that all but four or five of 400 black voters were disenfranchised while no white voters were.

<sup>7.</sup> In Yick Wo v. Hopkins, 118 U.S. 356 (1886), a city administered an ordinance in such a manner that permission to operate a laundry was denied to all 200 Chinese who sought permission during the same time period that such permission was granted to 80 non-Chinese.

Davis, 426 U.S. 229, 240 (1976). The burden of proof is on the claimant and the showing required of the claimant to establish a prima facie case of purposeful invidious discrimination depends on the context in which the claim arose. See Batson v. Kentucky, \_\_\_\_\_\_, \_\_\_\_, 90 L.Ed. 2d 69, 85-87 (1986); Wayte v. United States, \_\_\_\_\_\_, \_\_\_\_, 84 L.Ed. 2d 547, 556-557 and fn. 10 (1985); Washington v. Davis, supra, 426 U.S. at 253 (Stevens, J. concurring).

The general rule is that unless there is a "pattern as stark as that in Gomillion or Yick Wo, impact alone is not determinative." Arlington Heights v.

Metropolitan Housing Corp., supra, 429

U.S. at 266. In some exceptional contexts, proof of a less than stark pattern of disparate impact may demonstrate

purposeful racial discrimination because the very nature of the disputed decisionmaking task itself makes a racially disparate impact unexplainable except on racial grounds. For example, "[p]roof of systematic exclusion from the venire raises an inference of purposeful discrimination because the 'result bespeaks discrimination.' [Citations.]" Batson v. Kentucky, supra, 90 L.Ed. 2d at 86; see also Washington v. Davis, supra, 426 U.S. at 238-245. "But such cases are rare" (Arlington Heights v. Metropolitan Housing Corp., supra, 429 U.S. at 266), and important distinction may be drawn to separate them from those in which the general rule applies. $\frac{8}{}$ 

<sup>8.</sup> Whether petitioner's claim is presented in terms of an Eighth Amendment cruel and unusual punishment concern or in terms of a Fourteenth Amendment equal protection concern, the basic thrust of his claim is the same: governmental action

A. The Strict Procedural Safeguards
Built Into the Capital Sentencing
Process Justify Applying the
General Rule That Disparate Impact
Alone Is Insufficient to Support
a Claim of Discrimination

The decision-making process in the imposition of the death penalty is unique. Unlike any other decision-making process (such as in selecting the venire, or hiring or promoting employees or selling or renting a home, or drawing city voting boundaries, or issuing permits for laundries), the decision-making process involved in the imposition of the death penalty is replete with built-in procedural safeguards against purposeful invidious discrimination on the part of the decision makers. First, a constitutional capital sentencing system

has impacted in an invidiously discriminatory manner on a group of which he is a member. Thus, no matter how his claim is clothed, petitioner should be required to prove purposeful invidious discrimination.

itself is "suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." Gregg v. Georgia, 428 U.S. 153, 179 (1976). A constitutional capital sentencing system "can rationally distinguish between those individuals for whom death is an appropriate sanction and those for whom it is not." Spaziano v. Florida, 468 U.S. 447, 460 (1984). Additionally, as a criminal defendant, the capital defendant is entitled to insist that both the venire, from which the decision-making petit jury will be drawn, and the decision-making petit jury itself are selected pursuant to non-discriminatory criteria. Even the historically unfettered exercise of the peremptory challenge is restricted (for the prosecution at least), and the defendant may question at trial the peremptory exclusion of veniremen from the petit jury Mentucky, supra, \_\_\_\_\_ U.S. at \_\_\_\_; 90

L.Ed. 2d at 87. As an added precaution against purposeful invidious racial discrimination on the part of the decision makers, a capital defendant is entitled to have prospective jurors questioned on the issue of racial bias if there is a risk of racial prejudice infecting the sentencing proceeding. Turner v. Murray, \_\_\_\_ U.S. \_\_\_\_, \_\_\_; 90 L.Ed. 2d 27, 37 (1986). These are but a sampling of the panoply of safeguards protecting the capital sentencing decision-making process.

The procedural safeguards against purposeful invidious discrimination which are an integral part of the capital sentencing decision-making process readily distinguish that process from the job promotion and jury selection decision-making processes. In those processes

there are no comparable built-in safequards against purposeful invidious discrimination on the part of the decision makers. Thus, an examination of their decisions cannot begin with the same confidence. The safeguards present in capital sentencing justify applying the general rule that disparate impact alone will not establish a prima facie case of purposeful invidious discrimination unless, as the Court of Appeals held in the case below, the "disparate impact is so great that it compels a conclusion that the system is unprincipled, irrational, arbitrary and capricious such that purposeful [racial] discrimination . . . can be presumed to permeate the system." McCleskey v. Kemp, 753 F.2d 877, 892 (11th Cir. 1985).9/

Contrary to petitioner's contention that the Court of Appeals "fashioned unprecedented standards of proof" and

The Court has previously recognized and applied the principles underlying this conclusion in Pulley v. Harris, supra, 465 U.S. at 51-54. Therein, the Court addressed the issue whether mandatory comparative proportionality review was an essential element of a constitutional capital sentencing system. The Court found it was not, if the capital sentencing system already had in place other extensive procedural safeguards against arbitrariness. Clearly, if a system's in-place procedural safeguards against arbitrariness are factors to be considered in determining whether other such safeguards will be required, a fortiori, a system's in-place procedural

<sup>&</sup>quot;announced the abolition of the prima facie standard," the Court of Appeals in the case below merely restated this Court's general rule concerning proffers of disparate impact evidence. See Brief of Petitioner at 45, 62.

safeguards against purposeful invidious discrimination are also factors to be considered in determining what standard of proof should be applied to claims of discrimination within that system.

B. The Number, Complexity and Subjectivity of Factors
Considered in Capital Sentencing
Make Evidence of Disparate
Impact Alone Insufficient

In addition to the built-in procedural safeguards which distinguish the capital sentencing decision-making process from other decision-making processes, the greater number, complexity, subjectivity, and interactivity of factors legitimately affecting the capital sentencing decisions further distinguish the capital sentencing decision-making process from others.

Likewise, this difference also justifies applying the general rule, in claims of capital sentencing discrimination, that proof of disparate impact which reflects

anything less than a stark pattern will not establish a prima facie case of purposeful invidious discrimination.

There are comparatively few factors which can legitimately affect the decisions whether to select a person to be a part of the venire or a grand jury or whether to hire an applicant for a position as a police officer. Many of these factors, such as the prospective grand juror's county of citizenship or the prospective police officer's score on a civil service vocabulary examination, are also relatively simple, objective factors for the decision maker to weigh. Further, the same set of these factors are applicable in each decision whether to hire an individual for a job or to select an individual to sit on a grand jury. See Castaneda v. Partida, 430 U.S. 482, 484-485 (1977); Washington v. Davis,

<u>supra</u>, 426 U.S. at 232-236. In these contexts, a racially disparate impact evidenced by the decisions may itself hint of purposeful invidious discrimination merely because of the sparsity of alternative explanations.

The situation is starkly different as to decisions whether to sentence a person to death. These decisions are affected by countless legitimate factors, most of which are complex and subjective. Each individual case has its own set of unique legitimate factors. Indeed in each individual case, the capital-sentence decision maker is required to take into account "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Lockett v. Ohio, 438 U.S. 586, 604 (1978), emphasis added; Eddings

v. Oklahoma, 455 U.S. 104, 111, 113-114 (1982).

It is patent that the specific set of factors legitimately applicable to the capital sentencing decision in one case will not be the same set of factors legitimately applicable to the vast majority of other capital sentencing decisions. Petitioner does not bring to the Court's attention a single Georgia case other than his own in which the decision maker was faced with evidence sufficient to find the defendant guilty beyond a reasonable doubt of killing a police officer to prevent his own arrest for the public-endangering daytime armed robbery the officer caught him committing in a retail store, in which the robbery had been planned, in which the defendant had accomplices, in which the defendant boasted of the killing after his arrest, in which no mitigating evidence

was presented to the penalty decision maker, and in which the defendant had three prior convictions for armed robbery. See McCleskey v. Kemp, supra, 753 F.2d at 882; McCleskey v. Zant, 580 F.Supp. 338, 345-346 (N.D. Ga. 1984). Consequently, in the context of capital sentencing decisions, a racially disparate impact of those decisions does not itself suggest purposeful invidious discrimination because of the veritable ocean of alternative explanations.

Since a bare showing of a racially disparate impact of capital sentencing decisions does not begin to reflect the thousands of unique factors considered by the decision makers in all the cases, it cannot be said that such a disparate impact "bespeaks discrimination." See Hernandez v. Texas, 347 U.S. 475, 482 (1954). Thus, proof of disparate impact

alone cannot suffice to demonstrate
purposeful racial discrimination in the
imposition of the death penalty.

<u>Arlington Heights v. Metropolitan Housing</u>
Corp., supra, 429 U.S. at 266.

## C. Petitioner's Showing

Petitioner's evidence, at most, was nothing more than a showing of disparate impact. The "bottom line" of his argument is that, even when 39 legitimate sentencing factors are taken into account, killers of white victims in Georgia are on an average over 4.3 times more likely to receive a death sentence than similarly situated killers of black victims. 10/Brief for Petitioner at 55.

<sup>10.</sup> According to petitioner, Professors Baldus and Woodworth collected data on over 500 factors. Brief for Petitioner at 53. However, they considered only 39 factors in what they called "their most explanatory model", reflecting a logistic regression analysis. Id. at 55, 80, emphasis added. Although 230 variables

The fact that Professor Baldus considered 39 legitimate sentencing factors does not alter the disparate impact nature of his showing. It is no more suggestive of the conclusion that the race of the victim influenced the entire capital sentencing process in Georgia than it is suggestive of the conclusion that other legitimate factors, somehow associated with the race of the victim, but distinct from the race of the victim, influenced the process. In fact, if any conclusion can be drawn from Professor Baldus' figures it is the latter one. When Professor Baldus first examined Georgia's capital eligible cases and took into

were considered in another model, reflecting a multiple regression analysis, Professor Baldus apparently was of the opinion that the "most meaningful summary indicators of the magnitude of the racial factors found" were those that he calculated under the logistic regression analysis. Id. at 80.

consideration only the race of the victim, he found that the death sentencing rate in Georgia was nearly 11 times higher in white victim cases than in black victim cases. Id. at 52-53. This disparity plummeted from 11 to 4.3 when only 39 legitimate race-neutral factors were considered. Id. at 55. Thus, it would appear that when only a fraction of the innumerable possible legitimate capital sentencing factors were taken into account, the initial disparity was reduced by more than half. This would suggest that the race of victim disparity in Georgia merely reflects that white victims in Georgia are more likely to be targets of the aggravated type of killings which qualify the killer for the death penalty.

In the enormously complex and subjective context of capital sentencing, this "4.3" disparity based on a mechanical

consideration of only 39 factors is relatively small and does not present a pattern resembling that found in <u>Gomillion</u> or <u>Yick Wo</u>. Accordingly, petitioner did not meet his burden of proof.

II

EACH CAPITAL CASE IS UNIQUE AND THE COMPARISON OF ONE CASE WITH ANOTHER, THROUGH THE USE OF STATISTICAL ANALYSIS, CANNOT REASONABLY BE EXPECTED TO YIELD VALID RESULTS

The defect in petitioner's showing goes beyond his failure to demonstrate a level of disparate impact sufficient to make a prima facie case of purposeful invidious discrimination in the imposition of Georgia's death penalty. Amici curiae urge that, in the unique context of capital sentencing decisions, a generalized statistical showing of disparate impact does not even reliably show disparate impact. While it may be theoretically

possible to reduce capital sentencing decisions to a statistical analysis, in reality no statistical analysis of those decisions will yield a valid result.

As petitioner characterizes it, his argument is at heart simple and direct:
"Evidence of racial discrimination that would amply suffice if the stakes were a job promotion, or the selection of a jury, should not be disregarded when the stakes are life and death. Methods of proof and fact finding accepted as necessary in every other area of law should not be jettisoned in this one." Brief for Petitioner, at 31-32.

This contention demonstrates on its face why it is unsound. The methods of proof and factfinding accepted as necessary in other areas of the law are not jettisoned here. No one suggests that the principles established in Yick Wo,

Gomillion, Arlington Heights, and Washington v. Davis, supra (to name just a few pertinent cases) be ignored. Indeed, they are relied upon more strongly than ever. However, this is not a problem of discrimination in employment, housing or jury selection. Statistical analysis of capital cases is almost infinitely more complex than the statistical analysis of a job promotion or jury selection case. Petitioner has failed to meet the challenge of this argument. He masks over the near insuperable difficulties he faces with legal rhetoric which fails to address the problems of a statistical analysis of capital cases. If this were a simple case and the data analyzed by petitioner's experts were limited as it is in other types of discrimination cases (e.g., Castaneda v. Partida, supra, 430 U.S. 482 [jury panel composition]; Teamsters v.

United States, 431 U.S. 324 (1977)

[employment discrimination]), the problems we outline below would be considerably less important. But this is not a simple case. As we shall show, there is virtually no hope of success of showing race discrimination through a statistical analysis.

A. Use of Generalized Statistical
Studies of Capital Sentencing
Decisions Has Been Uniformly
Rejected by Lower Courts

Other courts which have addressed the issue of whether such generalized statistical studies as were presented in the instant case can succeed have concluded such studies have virtually no hope of success. Smith v. Balkcom, 660 F.2d 573, as modified 671 F.2d 858, 859-860 (5th Cir. 1982); Spinkellink v. Wainwright, 578 F.2d 582, 614-615 (5th Cir. 1978); Adams v. Wainwright, 709 F.2d 1443, 1449 (11th Cir. 1983); Stephens v.

Kemp, 464 U.S. 1027, 1030, n. 2 (1983)

(Powell, J., dissenting). As the Court stated in Smith v. Balkcom, supra, 671

F. 2d at 859: "The raw data selected for the statistical study bear no more than a highly attenuated relationship to capital cases actually presented for trial in the state. The leap from that data to the conclusion of discriminatory intent or purpose leaves untouched countless racially neutral variables."

# Are Different From Decisions In Other Contexts

Petitioner's argument that his statistical analysis is only different in degree from statistical analyses in other contexts such as jury panel composition and employment discrimination fails to address and appreciate the difficulties inherent in a statistical analysis of capital cases. Upon reflection, it will

be evident that there are qualitative differences which distinguish statistical analysis of capital cases from all other types of cases considered thus far by the courts.

Focusing first on employment discrimination cases reveals striking differences. In this context, the factors about an employee's background that are relevant to job performance are in general directly comparable across employees. They include education (does the employee have a high school diploma or a college degree), previous relevant job experience (has the employee or applicant any previous secretarial experience; can he/she drive a large tractor-trailer truck), supervisor evaluations (the employee's typing ability is nonexistent, poor, excellent), and the like. A comparison of these factors to the factors pertinent to death penalty

decisions reveals there is no analogue in employment discrimination cases to such factors as the presence of torture in a killing. See McCorquodale v. State, 211 S.E. 2d 577, 579-580 (Ga. 1974).

In addition, the decision makers and the decisions in capital sentencing have an entirely different character than in employment cases. In the employment situation, one company hires or promotes employees from a group of potential applicants. In capital cases, there is a separate decision maker (the trier of fact) for each case rather than one decision maker for all cases. In employment decisions, a subset of employees is selected from a pool for a given number of jobs. In capital cases, each case is decided on its own merits. There is no quota. In many hiring and licensing situations, all applicants have to pass

exactly the same objectively scored test.

A charge of discrimination in this context can be supported if the test does not meet the standards for job relatedness. There is no analogy to these situations in capital cases.

Other contexts such as whether a constitutionally racial balance has been achieved in the formation of a grand jury panel are even simpler than employment discrimination cases. See, e.g., Alexander v. Louisiana, 405 U.S. 625 (1972); Castaneda v. Partida, supra. Thus, relatively little statistical data may result in a compelling case. For example, in Alexander, a black defendant was able to show that although 21% of the adult local population was black, only one of 20 persons (5%) on the grand jury panel was black and none of the twelve persons on the grand jury which indicted him was

black. This, together with evidence that the jury commissioners knew the race of all prospective jurors, was sufficient to prove a prima facie case. Clearly, the data in Alexander was reliable and the statistical analysis simple and compelling.

Sentencing a person to death has elements not shared by these other types of decisions. Thus, one cannot expect statistical analyses aimed at detecting racial influences in death sentencing decisions to be the same as those that perform well in analyzing racial influences in other more simple social science contexts.

C. Critical Factors in Capital
Sentencing Decisions Cannot
Be Accurately and Reliably
Measured

This Court has indicated its concern in evaluating the reliability of quantitative evidence. Lockhart v. McCree,

U.S. \_\_\_\_, \_\_\_; 90 L.Ed. 2d 137, 144-147

(1986) [reliability of social science data purporting to show conviction-proneness of juries]; Dothard v. Rawlinson, 433 U.S. 321, 338 (1977) (concurring opinion of Rehnquist, J.) [reliability of statistical data purporting to show job disqualification of males versus females by reason of height and weigh requirements]. The reliability of the quantitative evidence submitted by petitioner in the instant case is open to great doubt.

Petitioner has failed to adequately respond to the issue of how a statistical analysis can accurately and reliably measure such factors as torture, prior criminal record, the circumstances of the crime, the helplessness of the victim(s), the life experience of the defendant, and unusual aggravating factors. For example, it is clearly inadequate to simply

determine that torture was either present or not present because there are varying degrees of torture. How does one compare cases when the criminal records of the defendants are not identical? Is the helplessness of a young brutalized female victim the same as the helplessness of a bound and gagged police officer? How does one compare the age and experience of a 22-year-old hostile, angry young male with the age and experience of a 35-year old, cold, calculating, sadistic middle-aged male? How do unusual aggravating factors enter into the equation? For example, in the facts behind Pulley v. Harris, supra, the defendant coolly finished eating the hamburgers which two teenage boys had been in the process of eating when the defendant kidnapped and murdered them for use of their car in a bank robbery. People v. Harris, 28 Cal.3d 935, 943-945 (1981).

How is such a factor measured? What measurable impact did it have on the jury? More importantly, how is it compared with other unusual but vastly different aggravating factors in other cases? 11/What of the attitude displayed by a defendant during trial? Evidence of this factor in the record may be sparse if it exists at all. If it does exist, how can it be measured in such a way that it can be compared with evidence of another defendant's attitude in a different case?

The courts have accepted as valid statistical analyses done in jury panel composition and employment discrimination

ll. A crucial case in point for amici is the California case of People v. Jackson, supra, 28 Cal.3d at 282-284, 303. During the course of one of his burglary-murders, Jackson raped his victim -- a 90-year old female -- with a wine bottle. Later, he described his victims to an acquaintance as "'two old bags [who] were a nuisance and . . . got what they deserved.'"

cases but they have not accepted as valid a statistical analysis of death penalty cases which claimed to prove race discrimination in the imposition of the death penalty because of these important distinctions.

Analysis of Capital Sentencing
Decisions in Georgia Cannot
Explain the Reasons Why
Petitioner Was Sentenced to
Death

Finally, the premise upon which

petitioner's analysis is based deliber
ately ignores what happened in his case.

A statistical analysis can never prove

directly that race was a factor considered

by the jury in petitioner's case. As

petitioner's foremost expert, David C.

Baldus, has stated in his book on the use

of statistics to prove discrimination:

"The primary limitation of quantitative proof in the discrimination context is its inability to support an inference about the reasons for a particular decision, such as why a certain individual was hired or fired, or why a particular law was adopted. Statistics can provide powerful insight into general or long-run behavior, but as for a particular decision -- and many cases are concerned with just one decision -- at best it can provide a presumption by inferring from the general to the particular." Baldus and Cole, Statistical Proof of Discrimination, at 5 (1980).

## E. Conclusion

Amici is not impugning the role of statistical analyses in the law as a general proposition. After all, this Court has made it "unmistakably clear that '[s]tatistical analyses have served and will continue to serve an important role' in cases in which the existence of discrimination is a disputed issue. [Citations.] " Teamsters v. United States, supra, 431 U.S. at 339. However, even in the context of employment discrimination, where the number of significant variables operating is limited, this Court recognizes that "statistics are not irrefutable; they come in infinite variety and,

like any other kind of evidence, they may be rebutted. In short, their usefulness depends on all of the surrounding facts and circumstances. See, e.g., Hester v. Southern R. Co., 497 F.2d 1374, 1379-1381 (CA5)." Id. at 340. Our point is that no court has ever validated the use of statistical analyses for the purpose of determining whether jury verdicts of capital cases, which involve hundreds if not thousands of significant variables, are constitutionally defective because the jury allegedly considered race of victim or defendant in arriving at their verdict. Capital cases are qualitatively different from other types of discrimination cases: the number of significant variables operating in this context is exponentially greater than in any context heretofore considered by this Court. For this reason, petitioner's

analysis should be rejected as without merit.

### III

PETITIONER'S STATISTICAL ARGUMENT UNDERMINES THE RIGHT TO TRIAL BY JURY AND SUBSTITUTES IN ITS PLACE TRIAL BY STATISTI-CAL ANALYSIS

Petitioner's position is an attack on the jury system itself.

The right to a jury trial is one of the foremost protections of our legal system. "It is fundamental to the American scheme of justice." Duncan v. Louisiana, 391 U.S. 145, 150 (1968). Its lineage can be traced to the time of the Norman Conquest. Walker & Walker, The English Legal System, at 229 (1980). It is a fundamental tenet that a criminal defendant is entitled to a trial by an impartial jury drawn from a representative cross-section of the community. This right is guaranteed by the Sixth Amendment

to the Constitution. <u>Taylor v. Louisiana</u>, 419 U.S. 522, 530 (1975). This right, thus, guarantees a defendant a trial by his peers and, together with other fundamental rights, ensures a fair and just determination of the cause. <u>Duncan v. Louisiana</u>, <u>supra</u>, 391 U.S. at 151-156.

Although juries are generally presumed to follow the law given to them by the court (Abney v. United States, 431 U.S. 651, 665 (1977); Shotwell Mfg. Co. v. United States, 371 U.S. 341, 367 (1963)), petitioner's statistical analysis implicitly assumes this presumption to be incorrect or inoperative. Notwithstanding the absence of any jury instruction permitting race to be considered by the jury, petitioner's statistical analysis rests on the conclusion that juries in fact do consider race in determining whether to impose the death penalty.

petitioner's statistical argument postulates that the death penalty verdicts reached by presumptively lawfully constituted juries, acting pursuant to constitutionally valid laws, are constitutionally invalid because statistically it can be shown that persons who kill white victims are more likely to receive the death penalty than those who kill non-whites.

This argument strikes at the heart of the judicial system. A jury's verdict, based on literally hundreds (perhaps thousands or millions) of individual bits of information, arrived at through the collective reasoning process of twelve separate persons, is reduced to mere statistical data. Petitioner would, in essence, substitute a statistical analysis for the jury's verdict. The end result would be the emasculation of the right to a jury trial.

Petitioner's argument postulates that regardless of the observance of his constitutional rights in the course of a jury or court trial, conducted pursuant to constitutionally valid laws, the verdict is always subject to further statistical analysis. Petitioner would, thus, create a super appellate process whereby after a verdict has been found legally valid on appeal to the highest court of a state, the verdict may nevertheless be tested again by being subjected to a statistical analysis. There is no constitutional basis for such procedure and a hearing aimed at subjecting jury verdict data in capital cases to such analysis is contrary to our system of criminal jurisprudence.

In his concurring opinion in <u>Gregg</u> v. <u>Georgia</u>, <u>supra</u>, 428 U.S. at 226, Justice White disposed of a similar argument:

"Petitioner has argued, in effect, that no matter how effective the death

penalty may be as a punishment, government, created and run as it must be by humans, is inevitably incompetent to administer it. This cannot be accepted as a proposition of constitutional law. Imposition of the death penalty is surely an awesome responsibility for any system of justice and those who participate in it. Mistakes will be made and discriminations will occur which will be difficult to explain. However, one of society's most basic tasks is that of protecting the lives of its citizens and one of the most basic ways in which it achieves the task is through criminal laws against murder. I decline to interfere with the manner in which Georgia has chosen to enforce such laws on what is simply an assertion of lack of faith in the ability of the system of justice to operate in a fundamentally fair manner.

#### CONCLUSION

Petitioner's statistical analysis of capital cases and the conclusions he reaches should be rejected. He has failed to prove even a prima facie case of race discrimination in the system. A fortiori he has failed to prove race discrimination by the jury in his case. In the instant case, petitioner has used "statistics as a

drunk man uses a lamp post -- for support and not illumination." Keely v.

Westinghouse Electric Corp., 404 F.Supp.

573, 579 (E.D.Mo. 1975).

Petitioner asks this Court to apply a standard for weighing evidence completely out of context. Then he asks this Court not just to accept but to validate a statistical analysis which inherently fails to identify and accurately measure all significant variables operating in capital cases. Finally, he asks this Court to reject his individual sentence of death on the novel theory that it must be infected with race bias because a general statistical analysis suggests race bias in other cases. All of this he asks be done after decisions by the Georgia Supreme Court, various federal courts, and this Court, upholding the jury's sentence. None of these requests have merit. To

validate any of them would be contrary to law previously laid down by this Court. To grant them all will be tantamount to rejecting one of the principal elements of our judicial system: trial by jury. Surely, such request must be denied as without any foundation in the law. The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

John K. Van de Kamp, Attorney General of the State of California

Ira Reiner, District Attorney of Los Angeles County

Michael D. Wellington Supervising Deputy Attorney General George M. Palmer Deputy District Attorney

Susan Lee Frierson Deputy Attorney General

Harry B. Sondheim [Counsel of Record] Head Deputy District Attorney Appellate Division

